TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 88

ELLA F. FONDREN AND THE ESTATE OF W. W. FONDREN, DECEASED, ET AL., PETITIONERS,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 19, 1944.

CERTIORARI GRANTED OCTOBER 9, 1944.

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DOCKET ENTRIES.

Docket No. 107473.

ELLA F. FONDREN,

Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Appearances:

For Taxpayer:
W. M. Cleaves, Esq.

For Comm'r:
Wilford H. Payne, Esq.

1941

May 26—Petition received and filed. Taxpayer notified. Fee paid.

May 26—Copy of petition served on General Counsel.

June 9—Request for Circuit hearing in Houston, Texas, filed by taxpayer. 6-9-41 Copy served.

July 14—Answer filed by General Counsel.

July 14—Request for hearing in Houston, Texas, filed by General Counsel.

July 21—Notice issued placing proceeding on Houston, Texas, calendar. Service of answer and request made.

1942

Sept. 5—Hearing set October 19, 1942—Houston, Texas.

Oct. 19—Hearing had before Mr. Arnold on merits. Submitted. Stipulation of facts filed. Briefs due 12-3-42. Reply 12-18-42.

Nov. 13—Transcript of hearing 10-19-42 filed.

Dec. 1—Brief filed by General Counsel.

Dec. 2—Brief filed by taxpayer. 12-16-42 Copy served on General Counsel.

Dec. 15—Reply brief filed by taxpayer. 12-16-42 Copy served on General Counsel.

1943

May 4—Opinion rendered—Arnold, Judge, Div. 12. Decision will be entered for respondent. 5-4-43 Copy served.

May 4—Decision entered. Black, Judge, Div. 15.

July 30—Petition for review by U. S. Circuit Court of Appeals, 5th Circuit, with assignments of error filed by taxpayer.

Aug. 20—Stipulation re petition for review filed by taxpayer.

Aug. 20—Agreed praecipe filed.

Sept. 1—Notice of filing petition for review filed.

DOCKET ENTRIES.

Docket No. 107474.

ELLA F. FONDREN, Independent Executrix of the ESTATE OF W. W. FONDREN, Deceased,

Amended Title: ESTATE OF W. W. FONDREN. Deceased, Ella F. Fondren, Independent Executrix (See Order of 6-11-41),

Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Appearances:
For Taxpayer:
W. M. Cleaves, Esq.

For Comm'r:
Wilford H. Payne, Esq.

1941

May 26—Petition received and filed. Taxpayer notified. Fee paid.

May 26—Copy of petition served on General Counsel.

June 9—Request for Circuit hearing in Houston, Texas, filed by taxpayer.

June 9—Motion to change caption filed by taxpayer. 6-9-41 Copy served.

June 11—Order that the caption be amended to read: "Estate of W. W. Fondren, deceased, Ella F. Fondren, Independent Executrix", entered.

July 14—Answer filed by General Counsel.

July 14—Request for hearing in Houston, Texas, filed by General Counsel.

July 21—Copy of answer and request served on taxpayer, Houston, Texas.

1942

Sept. 5—Hearing set October 19, 1942—Houston, Texas.

Oct. 19—Hearing had before Mr. Arnold on merits. Submitted. Stipulation of facts filed. Briefs due 12-3-42. Reply brief 12-18-42.

Nov. 13—Transcript of hearing 10-19-42 filed.

Dec. 1—Brief filed by General Counsel.

Dec. 2—Brief filed by taxpayer. 12-16-42 Copy served on General Counsel.

Dec. 15—Reply brief filed by taxpayer. 12-16-42 Copy served on General Counsel.

1943

May 4—Opinion rendered—Arnold, Judge, Div. 12. Decision will be entered for respondent. 5-4-43 Copy served.

May 4—Decision entered. Black, Judge, Div. 15.

July 30—Petition for review by U. S. Circuit Court of Appeals, 5th Circuit, with assignments of error filed by taxpayer.

Aug. 20—Stipulation re petition for review filed.

Aug. 20—Agreed praecipe filed.

Sept. 1—Notice of filing petition for review filed.

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3 PETITION.

United States Board of Tax Appeals.

Filed May 26, 1941.

Ella F. Fondren, Petitioner,

vs. Docket No. 107473

Commissioner of Internal Revenue, Respondent.

The above named Petitioner hereby petitions for a redetermination of the deficiency set forth by the Commis-

sioner of Internal Revenue in his notice of deficiency MT-ET-GT-92-37-1st Texas, Donor—Ella F. Fondren, dated March 10, 1941, and as a basis for this proceeding alleges as follows:

1. Petitioner is an individual with her principal office at 807 National Standard Building, Houston, Texas. The return for the period here involved was filed with the Collector for the 1st District of Texas at Austin, Texas.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to Petitioner on March 10, 1941.

3. The taxes in controversy are gift taxes for the calendar year 1937 and are in the amount of $8,400.00.

4. The determination of tax set forth in notice of deficiency is based upon the following error:

The Commissioner of Internal Revenue has improperly considered certain gifts made by Petitioner during the calendar year 1937 to be gifts of "future interests"; and has therefore disallowed the $5,000.00 annual exclusions claimed by Petitioner in connection with each of seven (7) separate gifts made by petitioner to seven (7) separate trusts respectively for the benefit of Petitioner's seven (7) grandchildren.

5. The facts upon which the Petitioner relies are as follows:

(a) Under date December 17, 1935, W. W. Fondren and wife, Ella F. Fondren, by formal written declaratory instrument as Grantors made, established, published, and declared a trust for their Grandson, Wash Bryan Trammell,

Jr., a full and correct copy of which written declaratory instrument is attached hereto and marked Exhibit B.

(b) Under date December 17, 1935, W. W. Fondren and wife, Ella F. Fondren, by formal written declaratory instrument as Grantors made, established, published, and declared a trust for their Granddaughter, Ellanor Anne Fondren, and which written declaratory instrument for all purposes of this protest, is of substantially same effect as said Exhibit B above referred to, saving and excepting only that the specific beneficiary named therein in lieu of being their Grandson, Wash Bryan Trammell, Jr., is Grantors' Granddaughter, Ellanor Anne Fondren.

(c) Under date December 17, 1935, W. W. Fondren and wife, Ella F. Fondren, by formal written declaratory instrument as Grantors made, established, published, and declared a trust for their Grandson, Peter Fondren Underwood, and which written declaratory instrument for all purposes of this protest, is of substantially same effect as said Exhibit B above referred to, saving and excepting only that the specific beneficiary named therein in lieu of being their Grandson, Wash Bryan Trammell, Jr., is Grantors' Grandson, Peter Fondren Underwood.

(d) Under date December 17, 1935, W. W. Fondren and wife, Ella F. Fondren, by formal written instrument as Grantors made, established, published, and declared a trust for their Granddaughter, Ellanor Anne Fondren, and which written declaratory instrument for all purposes of this protest, is of substantially same effect as said Exhibit B above referred to, saving and excepting only that the specific beneficiary named therein in lieu of being their Grandson, Wash Bryan Trammell, Jr., is Grantors' Granddaughter, Ellanor Anne Fondren.

(e) Under date December 17, 1935, W. W. Fondren and wife, Ella F. Fondren, by formal written declaratory instrument as Grantors made, established, published, and declared a trust for their Granddaughter, Mary Doris Fondren, and which written declaratory instrument for all purposes of this protest, is of substantially same effect as said Exhibit B above referred to, saving and excepting only that the specific beneficiary named therein in lieu of being their Grandson, Wash Bryan Trammell, Jr., is Grantors' Granddaughter, Mary Doris Fondren.

(f) Under date December 7, 1936, W. W. Fondren and wife, Ella F. Fondren, by formal written declaratory instrument as Grantors made, established, published, and declared a trust for their Grandson, Walter William Fondren, III, and which written declaratory instrument for all purposes of this protest, is of substantially same effect as said Exhibit B above referred to, saving and excepting only that the specific beneficiary named therein in lieu of being their Grandson, Wash Bryan Trammell, Jr., is Grantors' Grandson, Walter William Fondren, III.

(g) Under date December 2, 1937, W. W. Fondren and wife, Ella F. Fondren, by formal written declaratory instrument as Grantors made, established, published, and declared a trust for their Grandson, David Milton Underwood, and which written declaratory instrument for all purposes of this protest, is of substantially same effect as said Exhibit B above referred to, saving and excepting only that the specific beneficiary named therein in lieu of being their Grandson, Wash Bryan Trammell, Jr., is Grantors' Grandson, David Milton Underwood.

(h) During the calendar year 1937 and on or about December 2, 1937, Petitioner gave to each of the seven (7) trusts hereinabove particularly referred to 100 shares

of Humble Oil & Refining Company stock, the fair market value of said stock on the date of gift being $59.75 per share so that the fair market value of the gift to each of said seven (7) trusts was $5,975.00.

(i) In due time Petitioner prepared and filed in regular course Petitioner's gift tax return for the calendar year 1937, and in said gift tax return showed each of the above referred to gifts to the seven (7) respective trusts, and in connection with each trust claimed the statutory $5,000.00 annual exclusion and therefore reported as to each said trust taxable gift of $975.00 representing the difference between said annual exclusion of $5,000.00 and the fair market value of the gift, to-wit: $5,975.00. Petitioner then in regular course paid the gift tax on the basis of taxable gifts as so reported by her.

(j) In making her gift tax return for the calendar year 1937, Petitioner showed the "total amount of net gifts for preceding years" to be $1,218,600.00, so that Petitioner's gift tax rate for the calendar year 1937 on the gifts as reported by her was 24%, and the gift tax was computed and paid by Petitioner on such basis.

(k) The $8,400.00 gift tax deficiency as referred to in the Commissioner's letter of March 10, 1941, (Exhibit A) is claimed by the Commissioner to be due and payable as comprising 24% of $35,000.00, which latter sum is the total of the seven (7) annual exclusions of $5,000.00 each as claimed by Petitioner as hereinabove referred to.

(l) Along with his referred to letter of March 10, 1941, the Commissioner transmitted to Petitioner a "Statement" showing the basis on which the deficiency had been computed, a copy of which statement is attached hereto and marked Exhibit C.

(m) The said $8,400.00 gift tax deficiency is claimed by the Commissioner to be due on the theory that the respective gifts hereinabove referred to, constituted in each case a gift of a future interest against which no exclusion is allowable.

(n) Petitioner claims and now alleges as a fact, that neither of said gifts as hereinabove referred to constituted a gift of future interest but did, in fact, constitute a gift of present interest; and that, therefore, the annual exclusion of $5,000.00 is proper to be made in connection with each of said gifts; and that Petitioner properly deducted said annual exclusion from each of said gifts and that only the remainder of each of said gifts, to-wit: $975.00, is to be considered in computing Petitioner's 1937 gift tax; and that in view of the fact that Petitioner has heretofore duly and properly paid gift tax on all said gifts in excess of said $5,000.00 annual exclusions, there is no legal basis for any part of said $8,400.00 deficiency.

Wherefore your Petitioner prays that this Board may hear this proceeding; and that upon such hearing, this Board enter its judgment decreeing that each and all of the gifts hereinabove referred to were in fact and in law, gifts of present interests and not gifts of future interests; and that as to each of said gifts made to each of said respective trusts, Petitioner was and still is entitled to the statutory $5,000.00 annual exclusion; and that said $8,400.00 gift tax deficiency and each and every part thereof is improper and illegal; and ordering and requiring that said Commissioner refrain and desist henceforth from alleging any such deficiency and from assessing and collecting any tax on account thereof.

W. M. CLEAVES,
Attorney for Petitioner, Ella F. Fondren.

806 National Standard Bldg.,
Houston, Texas.

State of Texas,
County of Harris.

Ella F. Fondren, being duly sworn, says that she is the petitioner above named; and that she has read the foregoing petition and is familiar with the statements contained therein and that the statements contained therein are true.

ELLA F. FONDREN.

Subscribed and sworn to by Ella F. Fondren before me this the 28th day of April, 1941.

W. O. MANNING,
Notary Public in and for
Harris County, Texas.

(Seal)

10 EXHIBIT A.

Treasury Department,
Washington.

March 10, 1941.

MT-ET-GT-92-37-1st Texas.

Donor—Ella F. Fondren.

Mrs. Ella F. Fondren,
807 National Standard Building,
Houston, Texas.

Madam:

You are advised that the determination of your gift tax liability for the calendar year 1937 discloses a deficiency of $8,400.00 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the inclosed form and forward it to this office. The signing and filing of these forms will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,
GUY T. HELVERING,
Commissioner,
By D. S. BLISS,
(D. S. Bliss)
Deputy Commissioner.

Inclosure—11229.

For EXHIBIT "B" referred to in paragraph 5 of Petition see EXHIBIT 1-D, Page 51.

12 EXHIBIT C.

MT-ET-GT-92-1st Texas.

Donor—Ella F. Fondren.

Calendar year—1937.

Statement.

The deficiency is computed as follows:

	Returned	Determined
Total gifts, 1937, other than charitable, public and similar gifts	$ 59,750.00	$ 59,750.00
Less exclusions	50,000.00	15,000.00
Amount of gifts included	9,750.00	44,750.00
Less specific exemption	0.00	0.00
Net gifts, 1937	9,750.00	44,750.00
Net gifts for preceding years	1,218,600.00	1,263,600.00*
Total net gifts	1,228,350.00	1,308,350.00
Tax on total net gifts	221,754.00	240,954.00
Tax on net gifts for preceding years	219,414.00	230,214.00
Tax on net gifts, 1937	2,340.00	10,740.00
Tax shown on return		2,340.00
Deficiency, 1937		8,400.00

*Explained below.

The deficiency results from the following adjustment:

Schedule A	Returned	Determined
Exclusions	$ 50,000.00	$ 15,000.00

Three exclusions of $5,000.00 each are allowed with respect to the direct gifts to your children.

As it is provided in each of the trust instruments by which the trusts for the benefit of your grandchildren were created that the income or corpus shall be used only if necessary for the support, maintenance and education of

the beneficiary, it is held that the beneficiaries did not receive the immediate right to the unrestricted use, possession or enjoyment of the income or corpus. Accordingly, the gifts are gifts of future interests against which no exclusions are allowable.

The adjustment in net gifts for preceding years shown above, which does not affect your gift tax liability for this calendar year, results from the fact that you claimed exclusions in the amount of $30,000.00 for the calendar year 1935 and $45,000.00 for the calendar year 1936, whereas only three donees received gifts other than gifts of future interests in each of those years. Accordingly, $45,000.00, the excess of the amount claimed over the amount allowable, has been added to the amount shown as net gifts for preceding years shown on the return.

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14 ANSWER.

Received Jul. 14, 1941.

Filed Jul. 14, 1941.

United States Board of Tax Appeals.

Ella F. Fondren, Petitioner,
vs. Docket No. 107473.
Commissioner of Internal Revenue, Respondent.

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

1.

Admits the allegations contained in paragraph 1 of the petition.

2.

Admits that the notice of deficiency was mailed to petitioner on March 10, 1941. It is also admitted that a copy of said letter, without the accompanying statement, is attached to the petition herein and marked Exhibit A.

3.

Admits the allegations contained in paragraph 3 of the petition.

4.

Denies that in determining the deficiency asserted herein the Commissioner committed error as alleged in paragraph 4 of the petition.

5.

(a-g) Admits that prior to the close of the taxable year 1937 petitioner, Ella F. Fondren, and her husband, W. W. Fondren, now deceased, as grantors, established seven trusts, one each naming one of their seven grandchildren as a beneficiary. Denies each and every other allegation contained in subparagraphs (a) to (g), inclusive, of paragraph 5 of the petition.

(h) Admits that during the calendar year 1937, Petitioner made gifts in trust to each of the seven trusts, for the uses and purposes designated in the respective trust in-

struments, of 100 shares of Humble Oil & Refining Company stock, the fair market value of said stock on the date of gift being $59.75 per share, so that the fair market value of the gift in trust to each of said trusts was $5,975.00.

(i) Admits that petitioner prepared and filed a gift tax return for the calendar year 1937 and in said gift tax return showed each of the above referred to gifts to the seven respective trusts, and in connection with the gift to each trust claimed a $5,000.00 exclusion, and therefore reported as to each gift $975.00, representing the difference between the exclusion of $5,000.00 and the fair market value of the gift, to-wit: $5,975.00. Denies the remaining allegation contained in subparagraph (i) of paragraph 5 of the petition.

(j) Admits that in making her gift tax return for the calendar year 1937 petitioner showed the total amount of net gifts for preceding years to be $1,218,600.00. Denies the remaining allegations contained in subparagraph (j) of paragraph 5 of the petition.

(k) Admits that in the Commissioner's deficiency notice (Exhibit A to the petition herein) a deficiency in gift tax in the amount of $8,400.00 was determined to be due and payable from the petitioner for the taxable year 1937. Denies the remaining allegations contained in subparagraph (k) of paragraph 5 of the petition.

(l) Admits the allegations contained in subparagraph (l) of paragraph 5 of the petition.

(m) Admits the allegations contained in subparagraph (m) of paragraph 5 of the petition.

(n) Denies each and every allegation contained in subparagraph (n) of paragraph 5 of the petition.

6.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified, or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

(Signed) J. P. WENCHEL, FBS
(J. P. Wenchel)
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:
JAMES L. BACKSTROM,
Division Counsel,
WILFORD H. PAYNE,
Special Attorney,
Bureau of Internal Revenue.

WHP:mjh 7-9-41

PETITION.

United States Board of Tax Appeals.

Filed May 26, 1941.

Ella F. Fondren, Independent Executrix of the Estate of W. W. Fondren, Deceased, Petitioner,

vs. Docket No. 107474.

Commissioner of Internal Revenue, Respondent.

The above named Petitioner hereby petitions for a redetermination of the deficiency set forth by the Commis-

sioner of Internal Revenue in his notice of deficiency MT-ET-GT-45-37-1st Texas, Donor—W. W. Fondren (deceased), dated March 10, 1941, and as a basis for this proceeding alleges as follows:

1. Petitioner is now the duly and legally qualified Independent Executrix of the Estate of W. W. Fondren, deceased, with her principal office at 807 National Standard Building, Houston, Texas. The return for the period here involved was filed with the Collector for the 1st District of Texas at Austin, Texas.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to Petitioner on March 10, 1941.

3. The taxes in controversy are gift taxes for the calendar year 1937 and are in the amount of $8,400.00.

4. The determination of tax set forth in notice of deficiency is based upon the following error:

The Commissioner of Internal Revenue has improperly considered certain gifts made by W. W. Fondren during the calendar year 1937 to be gifts of "future interests"; and has therefore disallowed the $5,000.00 annual exclusions claimed by Petitioner in connection with each of seven (7) separate gifts made by W. W. Fondren to seven (7) separate trusts respectively for the benefit of said W. W. Fondren's seven (7) grandchildren.

5. The facts upon which the Petitioner relies are as follows:

(a) Under date December 17, 1935, W. W. Fondren and wife, Ella F. Fondren, by formal written declaratory instru-

ment as Grantors made, established, published, and declared a trust for their Grandson, Wash Bryan Trammell, Jr., a full and correct copy of which written declaratory instrument is attached hereto and marked Exhibit B.

(b) Under date December 17, 1935, W. W. Fondren and wife, Ella F. Fondren, by formal written declaratory instrument as Grantors made, established, published, and declared a trust for their Granddaughter, Sue Trammell, and which written declaratory instrument for all purposes of this protest, is of substantially same effect as said Exhibit B above referred to, saving and excepting only that the specific beneficiary named therein in lieu of being their Grandson, Wash Bryan Trammell, Jr., is Grantors' Granddaughter, Sue Trammell.

(c) Under date December 17, 1935, W. W. Fondren and wife, Ella F. Fondren, by formal written declaratory instrument as Grantors made, established, published, and declared a trust for their Grandson, Peter Fondren Underwood, and which written declaratory instrument for all purposes of this protest, is of substantially same effect as said Exhibit B above referred to, saving and excepting only that the specific beneficiary named therein in lieu of being their Grandson, Wash Bryan Trammell, Jr., is Grantors' Grandson, Peter Fondren Underwood.

(d) Under date December 17, 1935, W. W. Fondren and wife, Ella F. Fondren, by formal written declaratory instrument as Grantors made, established, published, and declared a trust for their Granddaughter, Ellanor Anne Fondren, and which written declaratory instrument for all purposes of this protest, is of substantially same effect as said Exhibit B above referred to, saving and excepting only that the specific beneficiary named therein in lieu of being their Grandson, Wash Bryan Trammell, Jr., is Grantors' Granddaughter, Ella Anne Fondren.

(e) Under date December 17, 1935, W. W. Fondren and wife, Ella F. Fondren, by formal written declaratory instrument as Grantors made, established, published, and declared a trust for their Granddaughter, Mary Doris Fondren, and which written declaratory instrument for all purposes of this protest, is of substantially same effect as said Exhibit B above referred to, saving and excepting only that the specific beneficiary named therein in lieu of being their Grandson, Wash Bryan Trammell, Jr., is Grantors' Granddaughter, Mary Doris Fondren.

(f) Under date December 7, 1936, W. W. Fondren and wife, Ella F. Fondren, by formal written declaratory instrument as Grantors made, established, published, and declared a trust for their Grandson, Walter William Fondren, III, and which written declaratory instrument for all purposes of this protest, is of substantially same effect as said Exhibit B above referred to, saving and excepting only that the specific beneficiary named therein in lieu of being their Grandson, Wash Bryan Trammell, Jr., is Grantors' Grandson, Walter William Fondren, III.

(g) Under date December 2, 1937, W. W. Fondren and wife, Ella F. Fondren, by formal written declaratory instrument as Grantors made, established, published, and declared a trust for their Grandson, David Milton Underwood, and which written declaratory instrument for all purposes of this protest, is of substantially same effect as said Exhibit B above referred to, saving and excepting only that the specific beneficiary named therein in lieu of being their Grandson, Wash Bryan Trammell, Jr., is Grantors' Grandson, David Milton Underwood.

(h) During the calendar year 1937 and on or about December 2, 1937, W. W. Fondren gave to each of the seven (7) trusts hereinabove particularly referred to 100 shares

of Humble Oil & Refining Company stock, the fair market value of said stock on the date of gift being $59.75 per share so that the fair market value of the gift to each of said seven (7) trusts was $5,975.00.

(i) In due time W. W. Fondren prepared and filed in regular course W. W. Fondren's gift tax return for the calendar year 1937, and in said gift tax return showed each of the above referred to gifts to the seven (7) respective trusts, and in connection with each trust claimed the statutory $5,000.00 annual exclusion and therefore reported as to each said trust taxable gift of $975.00 representing the difference between said annual exclusion of $5,000.00 and the fair market value of the gift, to-wit: $5,975.00. W. W. Fondren then in regular course paid the gift tax on the basis of taxable gifts as so reported by him.

(j) In making his gift tax return for the calendar year 1937, W. W. Fondren showed the "total amount of net gifts for preceding years" to be $1,234,847.50, so that W. W. Fondren's gift tax rate for the calendar year 1937 on the gifts as reported by him was 24%, and the gift tax was computed and paid by W. W. Fondren on such basis.

(k) The $8,400.00 gift tax deficiency as referred to in the Commissioner's letter of March 10, 1941, (Exhibit A) is claimed by the Commissioner to be due and payable as comprising 24% of $35,000.00, which latter sum is the total of the seven (7) annual exclusions of $5,000.00 each as claimed by W. W. Fondren as hereinabove referred to.

(l) Along with his referred to letter of March 10, 1941, the Commissioner transmitted to Petitioner a "Statement" showing the basis on which the deficiency had been computed, a copy of which statement is attached hereto and marked Exhibit C.

(m) The said $8,400.00 gift tax deficiency is claimed by the Commissioner to be due on the theory that the respec-

tive gifts hereinabove referred to, constituted in each case a gift of a future interest against which no exclusion is allowable.

(n) Petitioner claims and now alleges as a fact, that neither of said gifts as hereinabove referred to constituted a gift of future interest but did, in fact, constitute a gift of present interest; and that, therefore, the annual exclusion of $5,000.00 is proper to be made in connection with each of said gifts; and that W. W. Fondren properly deducted said annual exclusion from each of said gifts and that only the remainder of each of said gifts, to-wit: $975.00, is to be considered in computing W. W. Fondren's 1937 gift tax; and that in view of the fact that W. W. Fondren has heretofore duly and properly paid gift tax on all said gifts in excess of said $5,000.00 annual exclusions, there is no legal basis for any part of said $8,400.00 deficiency.

Wherefore your Petitioner prays that this Board may hear this proceeding; and that upon such hearing, this Board enter its judgment decreeing that each and all of the gifts hereinabove referred to were in fact and in law, gifts of present interests and not gifts of future interests; and that as to each of said gifts made to each of said respective trusts, W. W. Fondren and Petitioner was and still are entitled to the statutory $5,000.00 annual exclusion; and that said $8,400.00 gift tax deficiency and each and every part thereof is improper and illegal; and ordering and requiring that said Commissioner refrain and desist henceforth from alleging any such deficiency and from assessing and collecting any tax on account thereof.

W. M. CLEAVES.
Attorney for Petitioner, Ella F. Fondren, Independent Executrix of the Estate of W. W. Fondren, Deceased.

806 National Standard Bldg.,
Houston, Texas.

State of Texas,
County of Harris.

Ella F. Fondren, being duly sworn, says that she is the petitioner above named; and that she has read the foregoing petition and is familiar with the statements contained therein and that the statements contained therein are true.

ELLA F. FONDREN.

Subscribed and sworn to by Ella F. Fondren before me this the 28th day of April, 1941.

W. O. MANNING,
Notary Public in and for
Harris County, Texas.

(Seal)

24 EXHIBIT A.

Treasury Department,
Washington.

March 10, 1941.

MT-ET-GT-45-37-1st Texas.

Donor—W. W. Fondren (Deceased).

Ella F. Fondren, Executrix,
807 National Standard Building,
Houston, Texas.

Madam:

You are advised that the determination of the gift tax liability of the above-named deceased donor for the calendar year 1937 discloses a deficiency of $8,400, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the inclosed form and forward it to this office. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,
GUY T. HELVERING,
Commissioner,
By D. S. BLISS,
(D. S. Bliss)
Deputy Commissioner.

Inclosure—11230.

For EXHIBIT "B" referred to in paragraph 5 of Petition see EXHIBIT 1-D, Page 51.

26 EXHIBIT C.

MT-ET-GT-45-1st Texas.

Donor--W. W. Fondren (Deceased).

Calendar year—1937.

Statement.

The deficiency is computed as follows:

	Returned	Determined
Total gifts, 1937, other than charitable, public and similar gifts	$ 59,750.00	$ 59,750.00
Less exclusions	50,000.00	15,000.00
Amount of gifts included	9,750.00	44,750.00
Less specific exemption	0.00	0.00
Net gifts, 1937	9,750.00	44,750.00
Net gifts for preceding years	1,234,847.50	1,284,847.50*
Total net gifts	1,244,597.50	1,329,597.50
Tax on total net gifts	225,653.40	246,053.40
Tax on net gifts for preceding years	223,313.40	235,313.40
Tax on net gifts, 1937	2,340.00	10,740.00
Tax shown on return		2,340.00
Deficiency, 1937		8,400.00

*Explained below.

The deficiency results from the following adjustments:

Schedule A	Returned	Determined
Exclusions	$ 50,000.00	$ 15,000.00

Three exclusions of $5,000.00 each are allowed with respect to the direct gifts to the donor's children.

As it is provided in each of the trust instruments by which the trusts for the benefit of the donor's grandchildren were created that the income or corpus shall be used only if necessary for the support, maintenance and educa-

tion of the beneficiary, it is held that the beneficiaries did not receive the immediate right to the unrestricted use, possession or enjoyment of the income or corpus. Accordingly, the gifts are gifts of future interests against which no exclusions are allowable.

The adjustment in net gifts for preceding years shown above, which does not affect the donor's gift tax liability for this calendar year, results from the fact that the donor claimed exclusions in the amount of $35,000.00 for the calendar year 1935 and $45,000.00 for the calendar year 1936, whereas only three donees received gifts other than gifts of future interests in each of those years. Accordingly, $50,000.00, the excess of the amount claimed over the amount allowable, has been added to the amount shown as net gifts for preceding years shown on the return.

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28 ANSWER.

Received Jul. 14, 1941.

Filed Jul. 14, 1941.

United States Board of Tax Appeals.

Estate of W. W. Fondren, Deceased, Ella F. Fondren, Independent Executrix, Petitioner,

vs. Docket No. 107,474.

Commissioner of Internal Revenue, Respondent.

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

1.

Admits that Ella F. Fondren is the Executrix of the Estate of W. W. Fondren, deceased, with her principal office at 807 National Standard Building, Houston, Texas. It is also admitted that the return for the period here involved was filed with the Collector of Internal Revenue for the 1st District of Texas at Austin, Texas.

2.

Admits that the notice of deficiency was mailed to petitioner on March 10, 1941. It is also admitted that a copy of said letter, without the accompanying statement, is attached to the petition herein and marked Exhibit A.

3.

Admits the allegations contained in paragraph 3 of the petition.

4.

Denies that in determining the deficiency asserted herein the Commissioner committed error as alleged in paragraph 4 of the petition.

5.

(a-g) Admits that prior to the close of the taxable year 1937, W. W. Fondren, now deceased, and his wife, Ella F. Fondren, as grantors, established seven trusts, one each naming one of their seven grandchildren as a beneficiary. Denies each and every other allegation contained in subparagraphs (a) to (g), inclusive, of paragraph 5 of the petition.

(h) Admits that during the calendar year 1937 W. W. Fondren made gifts in trust to each of the seven trusts, for the uses and purposes designated in the respective trust instruments, of 100 shares of Humble Oil & Refining Company stock, the fair market value of said stock on the date of gift being $59.75 per share, so that the fair market value of the gift in trust to each of said trusts was $5,975.00.

(i) Admits that W. W. Fondren prepared and filed a gift tax return for the calendar year 1937 and in said gift tax return shown each of the above referred to gifts to the seven respective trusts, and in connection with the gift to each trust claimed a $5,000.00 exclusion, and therefore reported as to each gift $975.00, representing the difference between the exclusion of $5,000.00 and the fair market value of the gift, to-wit: $5,975.00. Denies the remaining allegation contained in subparagraph (i) of paragraph 5 of the petition.

(j) Admits that in making his gift tax return for the calendar year 1937 W. W. Fondren showed the total amount of net gifts for preceding years to be $1,234,847.50. Denies the remaining allegations contained in subparagraph (j) of paragraph 5 of the petition.

(k) Admits that in the Commissioner's deficiency notice (Exhibit A to the petition herein) a deficiency in gift tax in the amount of $8,400.00 was determined to be due and payable from the petitioner for the taxable year 1937. Denies the remaining allegations contained in subparagraph (k) of paragraph 5 of the petition.

(l) Admits the allegations contained in subparagraph (l) of paragraph 5 of the petition.

(m) Admits the allegations contained in subparagraph (m) of paragraph 5 of the petition.

(n) Denies each and every allegation contained in subparagraph (n) of paragraph 5 of the petition.

6.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified, or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

(Signed) J. P. WENCHEL, FBS
(J. P. Wenchel)
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:
JAMES L. BACKSTROM,
Division Counsel,
WILFORD H. PAYNE,
Special Attorney,
Bureau of Internal Revenue.

WHP:mjh 7-9-41

The Tax Court of the United States.

Estate of W. W. Fondren, Deceased, Ella F. Fondren, Independent Executrix, Petitioner.
vs.
Commissioner of Internal Revenue, Respondent.

Ella F. Fondren, Petitioner,
vs.
Commissioner of Internal Revenue, Respondent.

Docket Nos. 107473, 107474. Promulgated May 4, 1943.

W. W. Fondren and wife created separate irrevocable trusts for the benefit of each of their seven

minor grandchildren. Each trust instrument provided that the trust income, and thereafter trust corpus, if it be necessary, should be used for the proper maintenance, support, and education of each grandchild. If the trust income was not needed for these purposes it was to be accumulated and added to corpus and distributed in stated percentages upon each beneficiary arriving at the age of 25, 30, and 35, with remainder over in case of death. *Held*, as the obligation to support the beneficiaries rested on the parents, who were able to and did support them, and as the gifts to the beneficiaries were dependent on survivorship and were limited by the discretionary power vested in the trustee, the gifts in trust were of future and not present interests.

William M. Cleaves, Esq., for the Petitioners.

Wilford H. Payne, Esq., for the Respondent.

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32 OPINION.

ARNOLD, *Judge:*

These proceedings, consolidated for decision, involve gift tax deficiencies for 1937 of $8,400 each. The sole issue is whether gifts in trust were gifts of future interests, thereby prohibiting any $5,000 exclusion. The cases were submitted upon stipulated facts and exhibits. The stipulated facts are adopted as our findings of fact and the material portions are hereinafter set forth.

During the taxable year, and prior and subsequent thereto, Ella F. Fondren and W. W. Fondren were husband and wife, residing and domiciled in Texas. W. W. Fondren died intestate January 5, 1939. Ella F. Fondren is the duly appointed executrix of his estate, with offices in Houston, Texas. The gift tax returns of husband and wife were filed with the collector of internal revenue for the first district of Texas.

On December 17, 1935, W. W. Fondren and Ella F. Fondren executed a separate trust instrument in favor of each of their five grandchildren, namely, Ellanor Anne Fondren, Mary Doris Fondren, Peter Fondren Underwood, Wash Bryan Trammell, Jr., and Sue Fondren Trammell. At that time the eldest grandchild was less than six years of age. On December 7, 1936, decedent and his wife executed a trust instrument in favor of a sixth grandchild, Walter William Fondren III, born April 29, 1936. On December 2, 1937, they executed a seventh trust instrument in favor of David Milton Underwood, a grandchild born March 5, 1937. The provisions of the various trust instruments were substantially the same, so that the specific provisions of the first instrument hereinafter set forth are illustrative of the provisions of each indenture. The principal variation in the trust provisions were with respect to the successor beneficiaries in the event of the death of the principal beneficiary, all of whom were living when this proceeding was heard.

Each trust instrument constituted W. W. Fondren, trustee, and upon his death or resignation Ella F. Fondren was to succeed to the trusteeship. Each trust instrument expressly provided that W. W. Fondren and/or Ella F. Fondren might transfer, assign, and deliver additional property to the trustee for the benefit of the particular beneficiary. Upon the death of W. W. Fondren on January 5, 1939, Ella F. Fondren succeeded to the trusteeship and has since administered each trust as trustee.

The Trustee was given full power and authority with respect to the management, control and handling of the trust property. He could sell, mortgage, pledge, encumber or otherwise dispose of the same, and invest, reinvest, and keep invested all proceeds from earnings or sales so as to make the trust estate earn the best income consistent with safety of investment and sound business principles. Sales could be made in lots, parcels, or the entirety for such price

and purposes and under such terms and conditions as in the trustee's judgment was for the best interests of the trust estate. The trustee could institute, prosecute, maintain, and defend any suits, actions, or legal proceedings necessary in his judgment for the protection or enforcement of the interests of the trust estate. He could employ at the expense of the trust estate such accountants, agents, and attorneys as in his judgment were for the best interests of the trust estate. The exercise of any power conferred on the trustee was not to exhaust the power, but said power could be exercised as often as and whenever in the judgment of the trustee such exercise thereof was necessary or advisable for the best interests of the trust estate.

Article three of the trust instruments reads in part as follows:

Article Three.

> Out of the trust estate hereby created and as the same may hereafter be augmented and increased by gift from the Grantors, by either of them as herein provided for, or from any other source whatsoever, the Trustee shall provide for the support, maintenance and education of our said Grandson, [or Granddaughter as the case may be] using only the income of said estate for that purpose if it be sufficient. If it be necessary to use any of the corpus of the estate for that purpose and in the judgment of the Trustee it is best to do so, said Trustee may make advancements out of the corpus of said trust estate for such purpose for the benefit of our said Grandson.
>
> It is contemplated, however, that our said Grandson will have other adequate and sufficient means of support, and that it will not be necessary to use either the income or the corpus of the trust estate hereby cre-

ated to properly provide for his education, maintenance and support; and, if the income from the trust estate be not needed for these purposes, then all of the income from said trust estate not so needed shall be by the Trustee passed to capital account of said trust estate, and shall be and become a part of said trust estate, it being our hope that all of the earnings and income of said trust estate during the period of this Trust may be used to augment the trust estate and be delivered to our said Grandson at the periods herein provided for. It is expressly provided, however, that our said Grandson shall be properly maintained, educated and supported, and if it be necessary to use all of the income and even all of the corpus of the trust estate hereby created and all augmentations thereof, it shall be the duty of the Trustee to see that this obligation shall be properly and reasonably discharged.

* * * * * * *

The trusts were to continue until each grandchild attained the age of 35, but 25 per cent of the corpus and accumulations, if any, were to be delivered to the grandchild when he or she attained the age of 25, 33-1/3 per cent when he or she attained age 30, and the remainder when he or she attained age 35. If the beneficiary died leaving issue before termination of the trust, the trust estate was to be held and administered for the benefit of the issue and delivered share and share alike when the youngest of such issue attained age 21. If the beneficiary died without issue before termination of the trust, successor beneficiaries were provided for by the trust instruments, or the trust estate descended to the heirs under the laws of the State of Texas.

The stated purpose in creating the trust was "to provide for the personal comfort, support, maintenance and welfare of" each grandchild. The trust fund was not to be liable for obligations of the beneficiary. The beneficiary could

not anticipate his or her interest in the trust fund, and the fund could not be reached by judgment creditors or others having claim against any beneficiary. Other provisions common to trust indentures were included in the instruments, but such provisions are not deemed pertinent to the issue and are not set forth.

The trusts were absolute and irrevocable, with no interest in the estate or the benefits accruing therefrom received or retained by the grantors. The grantors reserved the right, however, to remove any acting trustee, except W. W. Fondren, and to name and appoint a successor trustee with the same rights, powers, and authority as the first trustee, a right which was also reserved to the survivor of the grantors.

On or about December 2, 1937, W. W. Fondren and Ella F. Fondren each gave to the trustee for each of the seven trusts aforementioned 100 shares of Humble Oil & Refining Co. stock. The gifts to the trust for David Milton Underwood were the first gifts to this trust. The gifts to the other trusts were in augmentation of the trust estates theretofore existing. The fair market value of the Humble Oil & Refining Co. stock on December 2, 1937, was $59.75 per share.

On their gift tax returns for 1937 W. W. Fondren and Ella F. Fondren each claimed the statutory exclusion of $5,000 and each reported a taxable gift to each of said trusts of $975. Each paid gift taxes on the basis of the taxable gifts so reported.

In addition to the seven gifts in trust for the benefit of their grandchildren, W. W. Fondren and Ella F. Fondren each made direct gifts of Humble Oil & Refining Co. stock during 1937 to their three children as follows: Walter W. Fondren, Jr., 100 shares; Catherine Fondren Underwood, 100 shares; and Susie Fondren Trammell, 100 shares. At the date of each of said gifts the fair market value of said stock was $59.75 per share. In their gift tax returns W. W.

Fondren and Ella F. Fondren each claimed a $5,000 exclusion with respect to each gift to their children, or a total exclusion for each of $15,000.

At all times subsequent to the creation of the aforementioned trusts the parents of the beneficiaries named therein have adequately and sufficiently provided for the proper and adequate support, maintenance and education of their children, with the result that no part of the trust income or corpus has been distributed, used, or applied to or for the benefit, support, maintenance, or education of any one of said beneficiaries.

In determining the deficiencies involved herein respondent allowed W. W. Fondren and Ella F. Fondren three $5,000 exclusions each with respect to the direct gifts made during 1937 to their children and disallowed to each seven $5,000 exclusions because of the gifts in trust for the benefit of their grandchildren. The disallowance in each instance was based upon respondent's determination that the gifts in trust constituted gifts of future interest in property against which no exclusions are allowable.

The gifts in trust made by W. W. Fondren and Ella F. Fondren for the benefit of their grandchildren in 1937 were gifts of future interests in property as to which no $5,000 exclusions are allowable in determining their gift tax liability for 1937.

Section 504 (b) of the Revenue Act of 1932 provides that the first $5,000 of gifts made to any person by the donor (other than gifts of future interests in property) shall not be included in the total amount of gifts made during such year. "Future interests" under article 11 of Regulations 79 (1936 Ed.) include "reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession or enjoyment at some future date or time". This regulation has been considered and approved by the Courts in a number of cases, *United States v. Pelzer*, 312 U. S. 399; *Ryerson v.*

United States, 312 U. S. 405; *Helvering v. Hutchings*, 312 U. S. 393; *Mary M. Hutchings*, 1 T. C. 692, and cases cited therein.

The Courts have decided numerous cases involving gifts in trust where the character of the gift, i. e., present or future, depended upon the amount of discretion lodged in the trustee to make distributions of trust income or corpus to the trust beneficiaries. Cf. *Smith v. Commissioner* (C. C. A., 8th Cir.), 131 Fed. (2d) 254, with *Welch v. Paine* (C. C. A., 1st Cir.), 130 Fed. (2d) 990. The latter case stated the rule, based on authorities therein cited, to be that if the right of the beneficiary to the use, possession, and enjoyment of the trust income or corpus is subject to the discretion of the trustee, the gift is a gift of a future and not a present interest. To the same effect is our decision in *Winston Paul*, 46 B. T. A. 920, where the net income of the trust was distributable "in such proportion as the trustee may in his absolute discretion determine"; in *Lillian Seeligson Winterbotham*, 46 B. T. A. 972, where the net income was distributable in such proportions as to the trustees "shall seem fit and proper * * * (such portion to be determined solely in the judgment and discretion of the said Trustees, and without any control over them in the exercise of such judgment or discretion) * * *"; and in *Mary M. Hutchings, supra*, where income could be accumulated or distributed in the "sole and absolute discretion" of the trustees. In each of these cases we held that the discretion lodged in the trustee so postponed the use, possession, and enjoyment of the income or corpus by the beneficiary that the gift was a gift of a future and not a present interest.

We think the situation here with respect to the discretion lodged in the trustee is much the same. While the draftsman of the several trust instruments failed to use the word "discretion" in describing the power and authority lodged in the trustee, such phrases as "in the judgment of the Trustee", "for the best interests of said trust estate", and "if it be necessary", which recur frequently in each instru-

ment, adequately vest the trustee with discretionary power and authority. It was the express duty of the trustee to see that the grandchildren were properly maintained, educated, and supported. In the discharge of that duty he could use trust income first and, if it be necessary, all the corpus. Performance of this duty required the exercise of discretion, whether so called in the trust instrument or not.

Furthermore, the grantors definitely contemplated that neither income nor corpus would be needed for the maintenance, support, and education of the grandchildren. It is stipulated that the parents of the grandchildren provided adequately for each and all of said children. It is apparent from this fact, and from the several trust instruments themselves, that the dominant purpose of the grantors was not so much the present giving to their grandchildren as it was the creation of a trust estate which would be partially distributed if, when, and as they attained the ages of 25, 30, and 35, respectively. Each trust instrument stated specifically that the grantors contemplated that the beneficiary named therein "will have other adequate and sufficient means of support", so that it would not be necessary to use net income or corpus, but income could be accumulated and added to corpus. The earnest hope was expressed that all earnings and income of the trust estate would be used to augment the trust estate and later distributed as a part of corpus. The trust income and corpus was a reserve which would provide for the grandchildren if necessary. The intent of the grantors, coupled with the legal obligation imposed on parents to support their children, leads us to the conclusion that the effect of the instruments was to postpone the gifts until the grandchildren achieved specified ages. Obviously, the right to possession, use, and enjoyment of the trust corpus was dependent upon survivorship. If so dependent, the gift is a gift of future interest. *Fisher v. Commissioner* (C. C. A., 9th Cir.), 132 Fed. (2d) 383.

Decision will be entered for the respondent.

(Seal)

(Copy)

38 DECISION.

The Tax Court of the United States,
Washington.

Ella F. Fondren, Petitioner,
vs. Docket No. 107473.
Commissioner of Internal Revenue, Respondent.

Pursuant to the determination of the Court, as set forth in its Opinion, promulgated May 4, 1943, it is

Ordered and Decided: That there is a deficiency in gift tax of $8,400 for the year 1937.

(S.) EUGENE BLACK,
Judge.

Enter: Entered: May 4, 1943.

(Copy)

39 DECISION.

The Tax Court of the United States,
Washington.

Estate of W. W. Fondren, Deceased, Ella F. Fondren, Independent Executrix, Petitioner,
vs. Docket No. 107474.
Commissioner of Internal Revenue, Respondent.

Pursuant to the determination of the Court, as set forth in its Opinion, promulgated May 4, 1943, it is

Ordered and Decided: That there is a deficiency in gift tax of $8,400 for the year 1937.

(S.) EUGENE BLACK,
Judge.

Enter: Entered: May 4, 1943.

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40 PETITION FOR REVIEW.

Filed July 30, 1943.

United States Circuit Court of Appeals for the Fifth Circuit.

The Tax Court of the United States.

Ella F. Fondren, Petitioner in Review,
vs. Docket No. 107473.
Commissioner of Internal Revenue, Respondent in Review.

and

The Tax Court of the United States.

Estate of W. W. Fondren, Deceased, Ella F. Fondren, Independent Executrix, Petitioner in Review,
vs. Docket No. 107474.
Commissioner of Internal Revenue, Respondent in Review.

Now come Ella F. Fondren and the Estate of W. W. Fondren, Deceased, Ella F. Fondren, Independent Executrix, respectively, original petitioners and now petitioners for review in the above styled and numbered causes and file this their petition for review of the consolidated decision of The Tax Court of the United States as rendered by said The Tax Court of United States on May 4, 1943.

I.

Brief Statement of Nature of Controversy.

The above causes involve United States gift tax deficiencies alleged by Respondent in Review to be owing by W. W. Fondren (now the Estate of W. W. Fondren) and wife, Ella F. Fondren, for the calendar year 1937.

The question is whether or not gifts made in trust by said W. W. Fondren and Ella F. Fondren during the calendar year 1937 were gifts of future interests so as to deny their exclusions in computing net taxable gifts of the donors for such taxable year.

Hearing was had in Houston, Texas, on October 19, 1942, and by reason of the fact that the issues involved in the two causes were substantially identical, The Tax Court of the United States, on motion of both parties, consolidated the two causes.

II.

Declaration of Court in Which Review is Sought.

Petitioners in Review hereby declare United States Circuit Court of Appeals for the Fifth Circuit to be the Court in which review is sought.

III.

Assignment of Error.

The Tax Court of the United States erred in holding that each of the several gifts involved in these causes were gifts of future interests and therefore improper to be excluded in computing net taxable gifts for the calendar year 1937.

IV.

Prayer.

Petitioners in Review file this their petition and ask that said decision of The Tax Court of the United States in these consolidated causes be reviewed and that upon said review said decision be reversed and decree rendered herein, adjudging and decreeing that each of the several gifts involved in these causes were gifts of present interests and therefore proper to be excluded in computing net taxable gifts of W. W. Fondren and Ella F. Fondren for the calendar year 1937, to the extent of $5,000.00 of each such gift.

W. M. CLEAVES,
Attorney for Petitioner in Review, Ella F. Fondren, in Docket No. 107473.

806 National Standard Building,
Houston 2, Texas.

W. M. CLEAVES,
Attorney for Petitioner in Review, Estate of W. W. Fondren, Deceased, Ella F. Fondren, Independent Executrix, in Docket No. 107474.

806 National Standard Building,
Houston 2, Texas.

State of Texas,
County of Harris.

Ella F. Fondren, being duly sworn, says that she is the Petitioner in Review in the consolidated causes hereinabove referred to, acting in her individual capacity in her said Docket No. 107473 and acting as Independent Executrix of the Estate of W. W. Fondren, Deceased, in said Docket No. 107474; and that she has read the foregoing petition and is familiar with the statements contained therein and that the statements contained therein are true.

ELLA F. FONDREN.

Subscribed and sworn to by Ella F. Fondren before me this the 27th day of July, 1943.

W. O. MANNING,
(W. O. Manning)
Notary Public in and for
Harris County, Texas.

(Seal)

W. M. CLEAVES,
Attorney for Petitioner in Review,
806 National Standard Building,
Houston 2, Texas.

NOTICE OF FILING PETITION FOR REVIEW.

44

Filed Sept. 1, 1943.

(Title Omitted.)

To: The Commissioner of Internal Revenue,
Washington, D. C.,
Respondent in Review.

You are hereby notified that the Petitioner for Review did on the 30th day of July, 1943, file with the Clerk of

The Tax Court of United States at Washington, D. C., a Petition for Review by the United States Circuit Court of Appeals for the Fifth Circuit of the decision of said Tax Court heretofore rendered in the above-entitled consolidated causes. A copy of the Petition for Review and the assignments of error as filed is hereto attached and served upon you.

(Sgd.) W. M. CLEAVES,
(W. M. Cleaves)
Counsel for Petitioner in Review.

806 National Standard Building,
Houston 2, Texas.

Service acknowledged July 30, 1943.

(Sgd.) J. P. WENCHEL, CAR
Chief Counsel, Bureau of Internal Revenue.

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46 STIPULATION.

Filed at Hearing October 19, 1942.

United States Board of Tax Appeals.

Ella F. Fondren, Petitioner,
vs. Docket No. 107473.
Commissioner of Internal Revenue, Respondent.

and

Estate of W. W. Fondren, Deceased, Ella F. Fondren, Independent Executrix, Petitioner,
vs. Docket No. 107474.
Commissioner of Internal Revenue, Respondent.

It is hereby stipulated and agreed by and between parties to these proceedings, through their respective counsel, that

the following facts are true, this agreement and stipulation being subject however to the right of either of the parties to present further evidence not inconsistent with the agreed and stipulated facts:

1. From long prior to March 20, 1930, and continuously until January 5, 1939, the date of the death of W. W. Fondren, the said W. W. Fondren and wife, Ella F. Fondren, lived together as husband and wife and during all of said time maintained their residence and domicile within the State of Texas.

2. Under date December 17, 1935, by formal written instruments duly signed and acknowledged by said W. W. Fondren and Ella F. Fondren before W. O. Manning, Notary Public in and for Harris County, Texas, the said W. W. Fondren and wife, Ella F. Fondren, made, established, published and declared five (5) certain trusts and by the terms of each of said formal written instruments constituted the said W. W. Fondren trustee to administer the trusts with the further provision that upon the death or resignation of said W. W. Fondren the said Ella F. Fondren should succeed to the trusteeship and with further provisions providing for the appointment of successor trustees, all as in said written instruments expressly provided.

3. Of the said five (5) certain written instruments next above referred to:

(a) One of said written instruments made, established, published and declared a trust for Ellanor Anne Fondren, the daughter of Walter W. Fondren, Jr., and successor beneficiaries as therein provided;

(b) One of said written instruments made, established, published and declared a trust for Mary Doris Fondren, the daughter of Walter W. Fondren, Jr., and successor beneficiaries as therein provided;

(c) One of said written instruments made, established, published and declared a trust for Peter Fondren Underwood, the son of Catherine Fondren Underwood, and successor beneficiaries as therein provided;

(d) One of said written instruments made, established, published and declared a trust for Wash Bryan Trammell, Jr., the son of Sue Fondren Trammell, and successor beneficiaries as therein provided;

(e) One of said written instruments made, established, published and declared a trust for Sue Trammell, the daughter of Sue Fondren Trammell, and successor beneficiaries as therein provided.

4. Under date December 7, 1936, by formal written instrument duly signed and acknowledged by said W. W. Fondren and Ella F. Fondren before W. O. Manning, Notary Public in and for Harris County, Texas, the said W. W. Fondren and wife, Ella F. Fondren, made, established, published and declared a certain trust for the benefit of Walter William Fondren III, the son of Walter William Fondren, Jr., and successor beneficiaries as therein provided and by the terms thereof constituted the said W. W Fondren Trustee to administer the trust with the further provision that upon the death or resignation of said W. W. Fondren the said Ella F. Fondren should succeed to the trusteeship and with further provisions providing for the appointment of successor trustees all as in said written instruments expressly provided.

5. Under date December 2, 1937, by formal written instrument duly signed and acknowledged by said W. W. Fondren and Ella F. Fondren before W. O. Manning, Notary Public in and for Harris County, Texas, the said W. W. Fondren and wife, Ella F. Fondren, made, established, published and declared a certain trust for the benefit of David

Milton Underwood, the son of Catherine Fondren Underwood, and successor beneficiaries as therein provided and by the terms thereof constituted the said W. W. Fondren trustee to administer the trust with the further provision that upon the death or resignation of said W. W. Fondren, the said Ella F. Fondren should succeed to the Trusteeship and with further provisions providing for the appointment of successor trustees all as in said written instrument expressly provided.

6. The said Ellanor Anne Fondren, daughter of Walter W. Fondren, Jr., was born July 23, 1932.

The said Mary Doris Fondren, daughter of Walter W. Fondren, Jr., was born March 20, 1930.

The said Peter Fondren Underwood, son of Catherine Fondren Underwood, was born October 1, 1935.

The said Wash Bryan Trammell, Jr., son of Sue Fondren Trammell, was born March 10, 1935.

The said Sue Trammell, daughter of Sue Fondren Trammell, was born August 5, 1933.

The said Walter William Fondren III, son of Walter William Fondren, Jr., was born April 29, 1936.

The said David Milton Underwood, son of Catherine Fondren Underwood, was born March 5, 1937.

The said Ellanor Anne Fondren, Mary Doris Fondren, Peter Fondren Underwood, Wash Bryan Trammell, Jr., Sue Trammell, Walter William Fondren III and David Milton Underwood are all grandchildren of said W. W. Fondren and Ella F. Fondren.

7. By the provisions of each of the seven (7) above mentioned written instruments it was expressly provided that the said W. W. Fondren and wife, Ella F. Fondren, and each of them might from time to time transfer, assign and deliver to the trustee additional property for the benefit of the particular beneficiary and successor beneficiaries for the purpose of augmenting the particular trust.

8. On or about December 2, 1937, the said W. W. Fondren gave to said W. W. Fondren Trustee of and for each of said above mentioned seven (7) trusts one hundred (100) shares of Humble Oil & Refining Company stock; and on or about the same date, to-wit, December 2, 1937, the said Ella F. Fondren gave to the said W. W. Fondren Trustee of and for each of said above mentioned seven (7) trusts one hundred (100) shares of Humble Oil & Refining Company stock, the said gift to the David Milton Underwood trust being the first gift to such trust, and the said gifts to the respective trusts for the other grandchildren being gifts in augmentation of the respective trust estates as theretofore existing.

9. The fair market value of Humble Oil & Refining Company stock on December 2, 1937, the date on which said gifts to said respective trusts were made by said W. W. Fondren and Ella F. Fondren, was $59.75 per share so that the fair market value of each of said 100 share gifts was $5,975.00.

10. W. W. Fondren continued to act as trustee in the administration of each and all of the trusts hereinabove mentioned until his death on January 5, 1939. Upon the death of W. W. Fondren the said Ella F. Fondren succeeded to the trusteeship of each and all of said trusts, as provided for therein, which trusteeship she has continuously since exercised and now exercises.

11. The said beneficiaries, Ellanor Anne Fondren, Mary Doris Fondren, Peter Fondren Underwood, Wash Bryan Trammell, Jr., Sue Trammell, Walter William Fondren III, and David Milton Underwood are each and all now living.

12. W. W. Fondren left a will naming Ella F. Fondren Independent Executrix of his Estate and in due time Ella F. Fondren made her application to the Probate Court of Harris County, Texas, for the probate of said will and for letters testamentary, and in due course the will was proved and admitted to probate and said Ella F. Fondren appointed and qualified as Independent Executrix of the Estate of W. W. Fondren, Deceased, and the said Ella F. Fondren is now the duly appointed, qualified and acting Independent Executrix of the Estate of W. W. Fondren, Deceased.

13. At all times subsequent to the creation of the trusts hereinabove specifically referred to the parents of said beneficiaries, Ellanor Anne Fondren, Mary Doris Fondren, Peter Fondren Underwood, Wash Bryan Trammell, Jr., Sue Trammell, Walter William Fondren III, and David Milton Underwood have respectively, adequately, and sufficiently provided for the proper and adequate support, maintenance and education of the said Ellanor Anne Fondren, Mary Doris Fondren, Peter Fondren Underwood, Wash Bryan Trammell, Jr., Sue Trammell, Walter William Fondren III, and David Milton Underwood with the result that no part of either income or corpus of either of said trust estates has been distributed, used, or applied to or for the benefit, support, maintenance or education of either of said beneficiaries.

14. In due time said W. W. Fondren and Ella F. Fondren filed in regular course their Gift Tax Returns for the calendar year 1937 and in said Gift Tax Returns showed each of

the above referred to gifts to said above referred to seven (7) respective trusts and in connection with each of said gifts in trust the said W. W. Fondren and Ella F. Fondren each claimed the statutory of $5,000.00 annual exclusion and therefore respectively reported as to each of said gifts a taxable gift for the year 1937 in the amount of $975.00 representing the difference between the annual $5,000.00 exclusion and the fair market value of the particular gift, to-wit, $5,975.00. Said W. W. Fondren and Ella F. Fondren then in regular course paid gift taxes on the basis of the taxable gifts so reported by them respectively as to each of said respective trusts.

15. In addition to the foregoing seven (7) gifts made in trust for the benefit of their grandchildren the said W. W. Fondren and Ella F. Fondren each made direct gifts in the year 1937 to their three (3) children as follows:

(a) Walter W. Fondren, Jr., son, 100 shares of Humble Oil & Refining Company stock having a fair market value on date of gift of $59.75 per share, or a total value of said gift of $5,975.00.

(b) Catherine Fondren Underwood, daughter, 100 shares of Humble Oil & Refining Company stock having a fair market value on date of gift of $59.75 per share, or a total value of said gift of $5,975.00.

(c) Susie Fondren Trammell, daughter, 100 shares of Humble Oil & Refining Company stock having a fair market value on date of gift of $59.75 per share, or a total value of said gift of $5,975.00.

In their gift tax returns filed for the year 1937, the said W. W Fondren and Ella F. Fondren each claimed a $5,000.00 exclusion with respect to each of the foregoing

gifts made directly to their three children (or total exclusions of $15,000.00 as to each petitioner with respect to said gifts).

16. The total amount of the net gifts made by W. W. Fondren for the taxable years preceding 1937, other than charitable, public and similar gifts, was reported by him in his gift tax return for 1937 to be $1,234,847.50, and was redetermined by the Commissioner to be $1,284,847.50.

17. The total amount of the net gifts made by Ella F. Fondren for the taxable years preceding 1937, other than charitable, public and similar gifts, was reported by her in her gift tax return for 1937 to be $1,218,600.00, and was redetermined by the Commissioner to be $1,263,600.00.

18. The adjustments made by the Commissioner in determining the total gifts made by petitioners for the years prior to 1937, as set out in paragraphs 16 and 17 above, are of no significance in these proceedings, inasmuch as it is agreed by the parties that the amounts of any additional gift taxes which may be found to be due from petitioners for the taxable year 1937, are to be computed at the rate of 24% on the additional net gifts, if any, ultimately determined to have been made by the respective petitioners for said year 1937.

19. In determining the deficiencies in gift taxes against petitioners for the taxable year 1937, which are involved in these proceedings, the Commissioner allowed to each petitioner three exclusions of $5,000.00 each with respect to the direct gifts made in that year to their three children and disallowed to each petitioner the seven exclusions of $5,000.00 each (or total exclusions of $35,000.00 as to each petitioner) which had been claimed in their gift tax returns on account of the gifts made in trust for the benefit of their seven grandchildren. In disallowing the seven exclusions

so claimed the Commissioner made the explanation, in the deficiency notices, that said gifts constituted gifts of future interests in property against which no exclusions are allowable.

20. True copies of the deficiency notices, with the statements attached thereto, which were issued by the Commissioner to W. W. Fondren and Ella F. Fondren under date of March 10, 1941, with respect to the additional gift taxes determined against them for the taxable year 1937, are attached hereto and marked Exhibits A and B, respectively, and are made a part of this stipulation.

21. It is further understood and agreed by the parties hereto that true and correct copies of the seven trust instruments hereinbefore referred to, pursuant to which petitioners established the trusts for their seven grandchildren, will be offered on behalf of petitioners and may be received in evidence without objection, at the hearing of these proceedings.

22. The parties also agree that these proceedings, involving a common issue as to proposed additional gift taxes of petitioners, husband and wife, may, for convenience, be consolidated for hearing and decision before the Board.

W. M. CLEAVES,
(W. M. Cleaves)
Counsel for Petitioners.

J. P. WENCHEL, JLB
(J. P. Wenchel)
Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.

55 For EXHIBIT "A" (Deficiency Letter and Statement of W. W. Fondren (deceased) Dkt. No. 107474, See Pages 22, 23 and 25 of petition.

For EXHIBIT "B" (Deficiency Letter and Statement of Ella Fondren, See Petition, Pages 10, 11 and 13, Dkt. No. 107473.

56 PETITIONER'S EXHIBIT 1-D.

October 19, 1942

The State of Texas,
County of Harris.

Know All Men By These Presents: That we, W. W. Fondren and his wife, Ella F. Fondren, of the State of Texas and County of Harris, and hereinafter referred to as Grantors, do hereby make, establish, publish, and declare a trust and gift for our Grandson, Wash Bryan Trammell, Jr., the son of our daughter, Sue Fondren Trammell, upon the terms, conditions and with the limitations hereinafter set forth, and for the purposes and objects herein expressed; and in consideration thereof, and in consideration of the love and affection which we bear to our said Grandson, we have granted, assigned, transferred, set apart and conveyed, and by these presents do grant, assign, transfer, set apart and deliver, to W. W. Fondren, as Trustee, and only in his capacity as Trustee, and to his successor and successors as such Trustee, all of the property described in "Exhibit A" which is hereto attached, marked with the initials of the Grantors for identification, and made a part hereof in the same manner and to the same effect as if fully set forth in detail in the face of this instrument; said property consisting of one hundred (100) shares of the capital stock of the

Humble Oil & Refining Company, a Texas corporation, which we have caused to be issued to said W. W. Fondren, Trustee, for the uses, purposes, and objects of this Trust.

To Have And To Hold all and singular the above described property, together with such other property as we or either of us may hereafter at any time and from time to time assign, transfer and convey for the augmentation of this Trust, to the said W. W. Fondren, Trustee, his successor or successors, but all in trust, nevertheless, for the uses, purposes, objects and benefits as hereinafter set forth.

The terms, conditions, powers, authorities, limitations, and restrictions upon and to the Trustee are as hereinafter set forth, and said property is accepted by said Trustee solely in his capacity as such Trustee, in accord with the terms hereof, and shall be held, managed, controlled, and disposed of by the said Trustee and his successor or successors solely as herein provided.

Article One.

It is contemplated that the Grantors herein, and each of them, may from time to time transfer, assign and deliver to said Trustee, or his successor or successors, additional property for the benefit of our said Grandson, for the purpose of augmenting this Trust. In case any such transfer, assignment and delivery shall be made to such Trustee, such additional property so assigned, transferred and delivered shall constitute and immediately be and become a part of the trust fund hereby created for the benefit of our said Grandson, and shall be in all things controlled, handled, managed and disposed of in accordance with the provisions of this instrument; and the acceptance of this Trust by the Trustee or any successor Trustee shall be

held to be the consent of such Trustee to the provisions of this instrument; and the acceptance by the Trustee of any gift or grant, from any source whatsoever, for the purpose of augmenting this Trust shall be a sufficient acceptance of such property under the terms and conditions hereof.

Whenever the Grantors, or either of them shall desire to make any additional gift or gifts to increase the trust estate created hereby, if the gift be personal property the Grantors shall make a description or a list thereof similar to that contained in "Exhibit A", initial the same, and deliver the list, together with the personal property comprising the gift, to the Trustee. If the gift be real estate, a similar list shall be made, and a deed or deeds conveying said real estate to the Trustee, as such Trustee, shall be duly executed by the donor and delivered to the Trustee. Any gift so made and delivered shall be, become, and remain a part of the trust estate hereby created, without any other or further action on the part of anyone, and shall thereupon be, become and remain an irrevocable gift to the trust estate.

Article Two.

There is hereby conferred upon and granted to the Trustee full power and authority to take, hold and receive said property, to manage, control and handle the same, to sell, mortgage, pledge, encumber, or otherwise dispose of the same, to invest, reinvest, and keep invested all the proceeds received from the earnings or income from said property, or any sale or sales thereof, so as to make said estate earn the best net income consistent with safety of investment and sound business principles. Said Trustee shall have full power and authority to sell in lots or parcels or in its entirety any and all of the property at any time belonging to said Trust Estate (including that granted herein and also including all property hereafter acquired

in any manner whatsoever for or by said trust estate), for such price, for such purposes, and upon such terms and conditions as in the judgment of the Trustee may be for the best interest of the trust estate. Said Trustee shall have full power and authority to institute, prosecute, maintain, and defend any and all suits, actions and legal proceedings in any and all Courts which may be necessary in the judgment of the Trustee for the protection or for the enforcement of the interests of the trust estate. The Trustee shall employ, at the expense of the trust estate, such accountants, agents and attorneys as may from time to time, in the judgment of the Trustee, be for the best interests of the trust estate. The exercise by the Trustee of any power herein conferred upon the Trustee shall not exhaust the power of the Trustee, it being intended that such power shall continue as to every part and parcel of said trust estate so long as said trust estate or any part thereof may be in the hands of the Trustee or his successor or successors, and may be exercised as often as and whenever in the judgment of said Trustee such exercise is necessary, or advisable for the best interests of said trust estate.

Article Three.

Out of the trust estate hereby created and as the same may hereafter be augmented and increased by gift from the Grantors, or either of them as herein provided for, or from any other source whatsoever, the Trustee shall provide for the support, maintenance and education of our said Grandson, using only the income of said estate for the purpose if it be sufficient. If it be necessary to use any of the corpus of the estate for that purpose and in the judgment of the Trustee it is best to do so, said Trustee may make advancements out of the corpus of said trust estate for such purpose for the benefit of our said Grandson.

It is contemplated, however, that our said Grandson will have other adequate and sufficient means of support, and that it will not be necessary to use either the income or the corpus of the trust estate hereby created to properly provide for his education, maintenance and support; and, if the income from the trust estate be not needed for these purposes, then all of the income from said trust estate not so needed shall be by the Trustee passed to capital account of said trust estate, and shall be and become a part of said trust estate, it being our hope that all of the earnings and income of said trust estate during the period of this trust may be used to augment the trust estate and be delivered to our said Grandson at the periods herein provided for. It is expressly provided, however, that our said Grandson shall be properly maintained, educated and supported, and if it be necessary to use all of the income and even all of the corpus of the trust estate hereby created and all augmentations thereof, it shall be the duty of the Trustee to see that this obligation shall be properly and reasonably discharged.

This Trust shall endure and continue until our said Grandson attains the age of twenty-five years, at which time the Trustee then acting shall deliver to him twenty-five per cent (25%) of said trust estate and its accumulations, if any, and shall retain the remainder thereof until our said Grandson shall attain the age of thirty years, when the Trustee shall deliver to him thirty-three and one-third per cent (33-1/3%) of the total amount of said estate then in his possession, including also the accumulations thereof; and the remainder of said trust estate shall be continued thereafter until our said Grandson shall reach the age of Thirty-five years, at which time all of said trust estate remaining in the hands of the trustee shall then be delivered to our said Grandson. These deliveries, however, are conditioned upon and subject to the continued life of our said Grandson until each such period is reached.

If our said Grandson, Wash Bryan Trammell, Jr., shall die leaving issue him surviving, before all of said trust estate shall be delivered to him, the said Wash Bryan Trammell, Jr., then said trust estate then held by the Trustee shall be held and administered by the Trustee for the benefit of such surviving issue of the said Wash Bryan Trammell, Jr., and shall be delivered to such issue, share and share alike, when the youngest of such issue shall attain the age of twenty-one years. If our said Grandson shall die without issue before the trust estate is finally delivered in full to him under the terms hereof, then all of the trust estate in the hands of the Trustee at the time of his death shall be held and administered by the Trustee for the use and benefit of our Granddaughter, Sue Trammell, and shall be distributed to her in the same manner and at the same periods of her age as herein provided for our said Grandson, Wash Bryan Trammell, Jr., and if she, the said Sue Trammell, shall die before said estate is delivered to her by the Trustee under the terms hereof and leave issue her surviving, said estate shall be held and administered by the Trustee for the benefit of such issue, and when the youngest of such issue shall attain the age of twenty-one years said estate shall be delivered to such issue share and share alike. If the said Sue Trammell shall die without issue, however, before the distribution of said trust estate is completed, the amount then in the hands of the Trustee shall descend to and be distributed to her heirs under the laws of the State of Texas.

During the continuance of this trust the Trustee shall make semi-annual reports to W. B. Trammell, the father of our said Grandson, so long as he shall live; and if he shall die, such reports shall be made to Sue Fondren Trammell, the mother of our said Grandson; and if the mother shall die, said reports shall be made to the legal guardian of said Wash Bryan Trammell, Jr., until he attains the age of twenty-one years, and thereafter shall be made to him.

The Trustee shall keep an accurate account of all receipts and disbursements, and his books, papers and accounts shall at all reasonable times be open to each beneficiary herein named, who may at the time be interested in said estate, and to the father and to the mother of said Wash Bryan Trammell, Jr., or to any person designated by either of them, for the purpose of examination, checking, verification, and accounting.

Article Four.

The Trustee shall at all times exercise reasonable care in the management of said trust estate and in the sale and purchase of securities and in the investment and re-investment of the moneys of said estate, but he shall not be held liable or accountable for any loss in selling or converting said securities or investing the proceeds of the sale thereof, or any other moneys belonging to said estate, except for willful or gross mismanagement of said estate; nor shall said Trustee be held liable for or required to make up any loss because of moneys remaining uninvested, or which he may be unable to invest, provided always that he has not been grossly negligent in failing to invest said estate or in keeping the same invested. The Trustee shall not be personally liable to the estate for the negligence of any person employed by him to perform any service for said estate, provided that the Trustee exercised reasonable care in the selection and employment of such person.

Article Five.

The purpose in creating this trust is to provide for the personal comfort, support, maintenance and welfare of our said Grandson. No part of said trust fund hereby created or hereafter augmented by Grantors shall ever be liable for any of the debts, liabilities, charges, or liens which our said Grandson may owe, become liable for, contract, or incur.

All sales, conveyances, assignments, transfers, pledges, incumbrances, or other dispositions of any kind or character whatsoever, whether voluntary or involuntary, for any beneficiary under this trust, shall be absolutely void and of no force or effect. No such debts, liabilities, charges, liens, sales, conveyances, assignments, transfers, pledges, incumbrances, or other disposition of any part or parcel of said estate by any beneficiary hereunder shall ever be recognized in any manner whatsoever by the Trustee. Said trust shall never be subject to any Court process subjecting or attempting to subject such trust fund to the payment of any debt or obligation of our said Grandson, or of any beneficiary hereunder, of any kind or character whatsoever, and all transfers, conveyances, assignments, liens, pledges, and incumbrances, voluntary or involuntary, by any beneficiary of said trust estate, or any part thereof, or of any part interest therein, howsoever made, and all Court process, writs, and proceedings against said estate to subject it to the payment of any debt, liability, charge, lien, transfer, pledge, or incumbrance of any beneficiary hereunder shall be wholly void and of no avail.

Article Six.

The Grantors herein, without in any respect retaining any interest in the trust estate hereby created, or in any benefits accruing therefrom, which trust is made absolute and finally irrevocable do hereby reserve unto themselves jointly, and to the survivor of them, the right, power and privilege, notwithstanding any provision heretofore set forth herein, to remove from time to time any Trustee at the time acting hereunder, and to name and appoint a successor to such Trustee. In order for such removal to be effective, the Grantors herein or the survivor of them, as the case may be, shall by an instrument in writing, directed to the Trustee then acting, give notice of such Trustee's removal and the appointment of his successor. It is under-

stood, however, that this power shall not extend to the removal of W. W. Fondren as Trustee, nor to the removal of Ella F. Fondren as Trustee, who is hereinafter designated as successor Trustee in the event of the death or resignation of said W. W. Fondren.

Any successor Trustee appointed by the Grantors herein, or the survivor of them, as the case may be, shall be vested with and shall have, hold and exercise all the rights, titles, powers, privileges and obligations of the Trustee named herein, with like force and effect as if such successor or successors were originally named and appointed herein.

Said designation of a new Trustee may be made whenever and as often as the Grantors herein named or the survivors of them shall deem it to the best interests of the trust estate; but it is distinctly understood, however, that this trust is absolutely irrevocable, and the Grantors reserve no rights in themselves to any interest in said trust estate, nor to any income therefrom, nor to any increase thereof, of any kind or character whatsoever, and reserve no control over the same except under the terms of this Trust as Trustees, and reserve to themselves no defeasance of said trust estate under any terms, conditions or circumstances whatsoever; and that whenever W. W. Fondren or Ella F. Fondren is acting as Trustee of said Estate all acts in the control, management and disposition of said estate shall be acts as Trustee and not individually, it being distinctly provided that the Grantors have no individual interest of any kind or character in, to or unto said trust estate, or any part thereof.

It is also provided that so long as W. W. Fondren or Ella F. Fondren shall be, become or act as Trustee hereunder no bond or other security shall be required of such Trustee for the faithful performance of the Trustee's duties hereunder, nor shall any bond or other security be required of any suc-

cessor Trustee who may be designated by the Grantors herein or by the survivor of them, as the case may be, nor shall any bond or other security be required of the National Bank of Commerce, hereinafter named as successor Trustee herein.

Article Seven.

Any Trustee may at any time resign, and upon making accounting and settlement for his trusteeship in handling said estate shall be relieved from further liabilities.

It is especially provided that W. W. Fondren shall be Trustee for said estate so long as he shall live, unless he shall resign; that upon his death or resignation, if she be then living, his wife, Ella F. Fondren, shall immediately be and become Trustee of said trust estate, possessing and exercising all of the rights, powers, privileges, and duties herein conferred upon said W. W. Fondren as Trustee; and no action on the part of anyone shall be necessary to effect such appointment and to put in operation the trusteeship of the said Ella F. Fondren. In the event of the death, resignation or refusal to act of both W. W. Fondren and Ella F. Fondren, then and in such event the National Bank of Commerce, a banking corporation chartered under the laws of the United States and having its principal office and place of business in the City of Houston, in Harris County, Texas, shall immediately be and become Trustee of said trust estate possessing and exercising all of the rights, powers, privileges, and duties herein conferred upon said W. W. Fondren as Trustee, and no action on the part of anyone shall be necessary to effect such appointment and to put in operation the trusteeship of the said The National Bank of Commerce of Houston, Texas. In the event said The National Bank of Commerce shall become Trustee hereunder subject to the power of removal by the Grantors

as herein provided for, said Bank shall continue as such Trustee notwithstanding its consolidation with other banks or change of its corporate name or renewal of its corporate charter or reorganization of its corporate structure, so long as it shall have power and authority under the laws of the State of Texas and of the United States to act as such Trustee, it being our intention and desire that no such change shall affect its authority as Trustee.

It is provided, however, that during the life of both Grantors herein they may jointly designate any Trustee they may select, and notwithstanding any other provisions herein to the contrary. Any Trustee so appointed shall possess, have, hold and exercise all powers over the trust estate herein granted to the Trustee herein named; and the Grantors, or the survivor of them, may remove any such Trustee so appointed by them in the manner herein provided for, for the removal of any Trustee. It is also provided that the surviving Grantor herein may resign as Trustee, and designate a successor Trustee, who shall have, hold and exercise all of the powers herein conferred upon the said W. W. Fondren, as Trustee, and such survivor may also remove such Trustee as herein provided.

In the event that the Grantors herein, or the survivor of them, shall designate a trustee as herein provided for, no action shall be necessary to effect such appointment, except to sign an instrument in writing, stating that such Trustee has been selected and appointed by the Grantors, or the survivor of them, for the administration of this Trust. Any Trustee so appointed shall supersede all other Trustees named in this instrument and, subject to removal as herein provided for, shall continue as Trustee of said trust estate.

If at any time there be no acting Trustee of said Estate and both the Grantors herein shall be deceased, then any

person interested in said trust estate for and on behalf of the beneficiary herein named or any beneficiary herein named, may apply to the District Court of Harris County, Texas, for the appointment of a Trustee, and such Court shall thereupon have full and complete jurisdiction and power to appoint a Trustee for the administration of said trust estate. It is not intended to restrict the power of the Court as to such appointment, but it is earnestly recommended that in such event the Court will appoint some Bank or Trust Company doing business in Houston, Texas, and having a paid-up capital of not less than Five Hundred Thousand Dollars, as such Trustee, and shall fix the compensation which said Trustee is to receive for the administration of the Trust; and any such order on the part of the Court, when properly entered, shall be binding upon all parties who may have any interest at any time in this trust. If the Court shall make an appointment other than as above requested, the Court is requested to fix the amount of security that such appointee will be required to give for the administration of the Trust and to approve the same before the appointment shall become effective.

For the protection, education, support and maintenance of our said Grandson we have made and executed this instrument, and have delivered to the Trustee herein named the securities described in "Exhibit A" hereto attached, and have completed the same, all on this the 17 day of December, A. D. 1935.

(Signed) ELLA F. FONDREN,
(Signed) W. W. FONDREN,
Grantors.

The State of Texas,
County of Harris.

Before me, the undersigned authority, on this day personally appeared W. W. Fondren and Ella F. Fondren, his wife, known to me to be the persons whose names are sub-

scribed to the foregoing instrument, and the said W. W. Fondren acknowledged to me that he executed the same for the purposes and consideration therein expressed. And the said Ella F. Fondren, wife of the said W. W. Fondren, having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said Ella F. Fondren, acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it.

Given under my hand and seal of office this 17 day of December, A. D. 1935.

(Signed) W. O. MANNING,
Notary Public in and for
Harris County, Texas.

(Seal)

EXHIBIT "A".

This Exhibit contains a description of the property given by the Grantors in the attached instrument, to the Grantee. In the first column is shown the name of the company in which shares of stock are donated; the second column the number of the Certificate of the shares of stock; the third column shows the number of shares of stock contained in the Certificate; the fourth column is the date of the issuance of the certificate; and the fifth column is the name of the Trustee to whom the certificate of stock is issued for the benefit of the Grantee herein.

Name of the Company Issuing Stock	Certificate Number	Number of Shares	Date of Issue	Name of Trustee
Humble Oil & Ref. Co.	T - 4002	100	12-23-35	W. W. Fondren
Houston Ltg. & Pwr. Co.	406415	1 Sh. 7% Pfd.	1-2-36	W. W. Fondren
Humble Oil & Ref. Co.	T - 4156	100	12-7-36	W. W. Fondren
Humble Oil & Ref. Co.	T - 4146	100	12-7-36	W. W. Fondren

STIPULATION IN CONNECTION WITH PETITION FOR REVIEW.

70 Received Aug. 20, 1943.

Filed August 20, 1943.

In the Tax Court of the United States.

Ella F. Fondren, Petitioner in Review,
vs. Docket No. 107473.
Commissioner of Internal Revenue, Respondent in Review.

and

In the Tax Court of the United States.

Estate of W. W. Fondren, Deceased, Ella F. Fondren, Independent Executrix,
vs. Docket No. 107474.
Commissioner of Internal Revenue, Respondent in Review.

In connection with the preparation of the record of the proceedings had before The Tax Court of the United States in the above-styled consolidated causes and for the sake of brevity, all parties to said causes acting herein by their attorneys of record stipulate that all seven declarations of trust which were introduced in evidence before The Tax Court upon the trial of above causes, being Exhibits Nos. 1-A, 1-B, 1-C, 1-D, 1-E, 1-F and 1-G introduced by Petitioners, under and with respect to which each of the gifts which are the subjects of the tax deficiencies involved in such causes were made, were at the time of the respective gifts, for the purposes of this Review, substantially of the same effect as is that certain Declaration of Trust executed by W. W. Fondren and wife, Ella F. Fondren, for the bene-

fit of Wash Bryan Trammell, Jr., dated December 17, 1935, and which was introduced at such trial as said Exhibit 1-C, saving and excepting only that the names and gender of the primary beneficiaries of said trusts vary in order to create a different trust for each of such seven primary beneficiaries, who are named in the opinion of The Tax Court of the United States.

And it is hereby agreed and stipulated by and between Petitioners in Review and Respondent in Review that, for the purposes of this review, such substantial similarities of said Declarations of Trust shall be taken as proven in the Court below and that this stipulation may be treated as a part of the record for this review without the necessity of copying each of said Declarations of Trust into the record.

Agreed to this the 14th day of August, 1943.

ESTATE OF W. W. FONDREN, DECEASED, ELLA F. FONDREN, INDEPENDENT EXECUTRIX,

By W. M. CLEAVES,
(W. M. Cleaves)
Attorney,

ELLA F. FONDREN,

By W. M. CLEAVES,
(W. M. Cleaves)
Attorney,
Petitioners in Review.

COMMISSIONER OF INTERNAL REVENUE,

By J. P. WENCHEL, CAR
Respondent in Review.

73 PETITIONER'S EXHIBIT 2.

U. S. Board of Tax Appeals, Div ..., Docket ..., Admitted in Evidence Oct. 19, 1942.

For each of the calendar years 1937, 1938, 1939, 1940 and 1941 Humble Oil & Refining Company paid annual dividends amount- to $2.00 per share; and dividends for 1942 paid by said company to date are on this same basis.

Of the 1937 dividends paid by the Humble Oil & Refining Company only $.62½ per share were paid after the making of the 1937 gifts hereinabove referred to.

The fair and reasonable cost of support, maintenance and education of each of the grandchildren beneficiaries in accordance with the standard of living to which they were accustomed prior to and during the year 1937 would reasonably be not less than $750.00.

PRAECIPE FOR RECORD ON REVIEW.

74 Filed Aug. 20, 1943.

In the Tax Court of the United States.

Ella F. Fondren, Petitioner in Review,
vs. Docket No. 107473.
Commissioner of Internal Revenue, Respondent in Review.

and

In the Tax Court of the United States.

Estate of W. W. Fondren, Deceased, Ella F. Fondren, Independent Executrix,
vs. Docket No. 107474.
Commissioner of Internal Revenue, Respondent in Review.

Whereas Petitioners in Review in the above consolidated causes desire the following documents, papers and matters to be incorporated in the record on review, to-wit:

1. The docket entries of proceedings before The Tax Court of the United States.

2. Pleadings before The Tax Court.

3. Findings of fact, opinion and decision of The Tax Court.

4. Petition for Review.

5. Statement of the evidence as included in the following:

(a) Stipulation of facts introduced at the hearing before The Tax Court of the United States;

(b) Copy of Petitioner's Exhibit 1-D, being Declaration of Trust by W. W. Fondren and Ella F. Fondren for Wash Bryan Trammell, dated December 17, 1935;

(c) Stipulation in Connection With Petition for Review as to substantial similarity of the several trust indentures introduced;

(d) Petitioner's Exhibit 2, introduced by Petitioners at the trial of these causes over Respondent's objection thereto on the ground of incompetency and irrelevancy.

Now therefore Petitioners in Review, Ella F. Fondren and the Estate of W. W. Fondren, Deceased, Ella F. Fondren, Independent Executrix, hereby request the Clerk of The Tax Court of the United States to prepare the record

and incorporate therein copies of the above listed documents, papers and matters for transmission to the Clerk of the Circuit Court of Appeals for the Fifth Circuit.

And Respondent in Review, the Commissioner of Internal Revenue, acting by his attorney of record, does hereby agree that such documents, papers and matters constitute a true and correct statement of evidence and record for review in said consolidated causes.

ESTATE OF W. W. FONDREN, DECEASED, ELLA F. FONDREN, INDEPENDENT EXECUTRIX,

By W. M. CLEAVES,
(W. M. Cleaves)
Attorney,
Petitioner in Review.

ELLA F. FONDREN,

By W. M. CLEAVES,
(W. M. Cleaves)
Attorney,
Petitioner in Review.

COMMISSIONER OF INTERNAL REVENUE,

By J. P. WENCHEL, CAR
Respondent in Review.

77 CERTIFICATE.

The Tax Court of the United States,
Washington.

Ella F. Fondren, Petitioner,
vs. Docket No. 107473.
Commissioner of Internal Revenue, Respondent.

and

Estate of W. W. Fondren, Deceased, Ella F. Fondren, Independent Executrix, Petitioner,
vs. Docket No. 107474.
Commissioner of Internal Revenue, Respondent.

I, B. D. GAMBLE, Clerk of The Tax Court of the United States, do hereby certify that the foregoing pages, 1 to 76, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 24th day of September, 1943.

B. D. GAMBLE,
Clerk, The Tax Court of the
United States.

(Seal)

[fol. 71] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz.:

ARGUMENT AND SUBMISSION

Extract from the Minutes of February 2, 1944

No. 10829

ELLA F. FONDREN and the Estate of W. W. FONDREN, Deceased, ELLA F. FONDREN, Independent Executrix,

versus

COMMISSIONER OF INTERNAL REVENUE

On this day this cause was called, and, after argument by W. M. Cleaves, Esq., for petitioners, and Robert Koerner, Esq., Special Assistant to the Attorney General, for respondent, was submitted to the Court.

[fol. 72] OPINION OF THE COURT—Filed March 3, 1944

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10829

ELLA F. FONDREN and the Estate of W. W. FONDREN, Deceased, Ella F. Fondren, Independent Executrix, Petitioners,

versus

COMMISSIONER OF INTERNAL REVENUE, Respondent

Petition for Review of Decisions of the Tax Court of the United States (District of Texas)

(March 3, 1944)

Before Sibley, McCord, and Waller, Circuit Judges

McCORD, Circuit Judge:

The appeal involves gift taxes for the calendar year 1937, and is taken in two cases which by agreement were consolidated and tried together.

Question: Are gifts of stock in augmentation of seven irrevocable trusts, gifts of future interests to which $5,000 exclusions as to each are allowable under Section 504, (b) of the Revenue Act of 1932?

[fol. 73] Pertinent facts: During 1935, 1936 and 1937 taxpayer and her husband executed a separate trust instrument in favor of each of seven grandchildren, each being below the age of six years at the time the trust was created. On December 2, 1937 taxpayer and her husband each made a gift to each trust of 100 shares of Humble Oil & Refining Company stock of the value of $59.75 a share, the fair market value of each of the 100 share gifts being $5,975.00.

On their gift tax returns for 1937 taxpayer and her husband each claimed the statutory exclusion of $5,000 for each of their seven gifts, reported a taxable gift for each trust of $975.00, and paid gift taxes on this basis.

The trust instruments were substantially the same, the principal variation being with respect to the successor beneficiaries in the event of the death of either of the principal beneficiaries. All the beneficiaries were living when this proceeding was heard. The trusts were absolute and irrevocable, with no interest in the estate retained by the grantors. The grantors reserved the right to remove any active trustee except W. W. Fondren, and to name a successor trustee with the same rights, powers and authorities as the first trustee, a right which was also reserved to the survivor of the grantors. Each trust instrument provided that taxpayer and her husband might transfer, assign and deliver additional property to the trustee for the benefit of the beneficiary.

The stated purpose in creating each trust was to provide for the personal comfort, support, and maintenance and welfare of each grandchild. The trust was to continue until each grandchild attained the age of 35, but twenty-five per cent of the corpus and accumulations, if any, were to be delivered to the grandchild when he or she attained the age of 25; thirty-three and one-third per [fol. 74] cent (33⅓%) when he or she attained the age of 30; and the remainder when he or she attained the age of 35. If the beneficiary died leaving issue before termination of the trust, the estate was to be held and administered for the benefit of the issue and delivered when the youngest of such issue attained the age of 21. If the beneficiary died without issue before termination of the trust, successor

beneficiaries were provided for by the trust instruments. The trust funds were not to be liable for obligations of the beneficiary. A beneficiary could not anticipate his or her interest in the trust fund created, and such funds could not be reached by judgment creditors or others having claims against the beneficiary. The trustee was given full power and authority with respect to the management and control of trust funds. He could sell, mortgage, or pledge any or all of the trust funds, and could institute or defend suits or legal proceedings necessary in his judgment for the protection or enforcement of the interest of the trust estate. This power was to be in no wise diminished during the life of the trust.

W. W. Fondren was named trustee of each trust instrument. He died on January 5, 1939, and taxpayer, Ella F. Fondren, his wife, succeeded to the trusteeship.

At all times subsequent to the creation of the trust, the parents of the named beneficiaries have adequately and sufficiently provided for the support, maintenance and education of the children named in the trust. As a result, no part of the trust income or corpus has been distributed, used or applied for the benefit, support, maintenance or education of any one of the beneficiaries of the seven trusts.

The Tax Court found that the gifts of stock made by taxpayer and her husband in 1937 to the trust estates [fol. 75] were gifts of future interests as to which exclusions were not allowable in determining their gift tax liability for that year. The cases as consolidated are before us for review.

Decision must turn on that part of Article 3 of the trust instruments, which is as follows:

> "Out of the trust estate hereby created and as the same may hereafter be augmented and increased by gift from the Grantors, or either of them as herein provided for, or from any other source whatsoever, the Trustee shall provide for the support, maintenance and education of our said Grandson, using only the income of said estate for the purpose if it be sufficient. If it be necessary to use any of the corpus of the estate for that purpose and in the judgment of the Trustee it is best to do so, said Trustee may make advancements out of the corpus of said trust estate for such purpose

for the benefit of our said Grandson. It is contemplated, however, that our said Grandson will have other adequate and sufficient means of support, and that it will not be necessary to use either the income or the corpus of the trust estate hereby created to properly provide for his education, maintenance and support; and, if the income from the trust estate be not needed for these purposes, then all of the income from said trust estate not so needed shall be by the Trustee passed to capital account of said trust estate, and shall be and become a part of said trust estate, it being our hope that all of the earnings and income of said trust estate during the period of this trust may be used to augument the trust estate and be delivered to our said Grandson at the periods herein provided for. It is expressly provided, however, that our Grandson shall be properly maintained, educated and supported, and [fol. 76] if it be necessary to use all of the income and even all of the corpus of the trust estate hereby created and all augmentations thereof, it shall be the duty of the Trustee to see that this obligation shall be properly and reasonably discharged. * * *"

Treasury Regulations 79 (1939 ed.) Article 11, defines future interests and has been quoted with approval by our court of last resort: "'Future interests' is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time * * *."

So that, we find the answer to our question: When Article 3 of the trust instrument is measured by decision it becomes patent that the trust gifts here in question were gifts of future interests and the seven exclusions in question are clearly not allowable.

United States v. Pelzer, 312 U. S. 399; *Ryerson v. United States*, 312 U. S. 405; *Fisher v. Commissioner of Internal Revenue*, 132 F. (2d) 383; *Commissioner of Internal Revenue v. Wells*, 132 F. (2d) 405; *Sensenbrenner v. Commissioner of Internal Revenue*, 134 F. (2d) 883; *Commissioner of Internal Revenue v. Phillips' Estate*, 126 F. (2d) 851.

The decision of the Tax Court is affirmed.

WALLER, Circuit Judge, dissenting:

The trusts here were irrevocable. There was no defeasance, reversion, nor was any benefit retained in the donors. This was expressly stated in Article 6 of the trust indenture.

[fol. 77] The grandchildren were all of tender years when the trust was created, the oldest one being less than six at the time the trust was created, and the ages of several being counted in months rather than in years.

These grandchildren were given the fullest "use, possession, and enjoyment" that was possible sensibly to confer upon children of such tender age. If the reasoning of the respondent and the Tax Court is correct, then there could never be a substantial gift to a baby except a gift of a future interest, for always is it necessary for some person *sui juris* to handle, manage, conserve, and utilize the property of a child of tender years until he is old enough to manage it himself.

Whether or not a substantial gift of money, or its ready equivalent, is a gift of a future interest should be determined by the time and finality of its vesting rather than the time and manner of its spending.

Viewed in the light of the definition in the Treasury regulations that an interest or estate which is to commence in "use, possession, or enjoyment at some future date and time" is a future interest, we find that the beneficiaries of the trust here, being children of tender years, are possessed of the highest and best use and enjoyment possible to confer upon such young children. To donate and deliver shares of stock to a babe in the cradle, with no direction, custody, or management, would be the height of folly. Valuable shares of stock are not given to babes in cradles to chew up or use as a substitute for a pacifier. But here the corpus is being managed and preserved, and the income is being collected and safeguarded by trustees vitally interested in the welfare of the *cestuis que trust*. Both the income and the corpus are irrevocably dedicated to the support, maintenance, and welfare of these children—the object of the trust. The gift stands between them and [fol.78] adversity like a "rock in a weary land, a shelter in time of storm". It is submittted that the irrevocable

vesting of such rights in property is a "present use", a "present enjoyment", of such property; that one who has the right to spend the issues, rents, and profits from an estate, or to have same spent for his benefit, has both the present use and present enjoyment of such an estate. If an adult donee of such a gift saw fit to leave the corpus of the gift intact and to accumulate the income for himself at a future date, this would not convert a present gift into a future interest, nor would such a handling of a minor's estate by one in *loco parentis*, operating either pursuant to statute or pursuant to the solemn obligations of trusteeship, convert a present and irrevocable gift into a future interest.

The cases cited in support of the majority opinion are dissimilar and undecisive of the issues here. Some of the distinguishing features of the cited cases will be pointed out:

United States vs. Pelzer, 312 U. S. 399—No beneficiary could receive any benefit from the trust before the end of ten years or before he was twenty-one, whichever occurred last, and then only if he survived. It was a trust for the benefit of eight grandchildren with provision for any after-born grandchildren.

Rogerson vs. United States, 312 U. S. 405—The trust was terminable by the joint action of two trustees or by the death or mental incapacity of either of the trustees. The trust had numerous other conditions not present here.

Fisher vs. Commissioner, 132 F. 2d 383—The distribution in this case was to the grandchildren who were twenty-one years of age or to the parents of any under twenty-one for the use and benefit of the parents. One-sixth of the corpus [fol. 79] was to be distributed to each grandchild upon attaining the age of twenty-five years or to his issue if the said grandchild was not living, or, in case of death without issue, to the surviving grandchildren and to the children of the grandchildren that were deceased.

Commissioner of Internal Revenue vs. Wells, 133 F. 2d 405—The amount of income and principal to be distributed to the beneficiary was left entirely in the discretion of the trustee.

Sensenbrenner vs. Commissioner, 134 F. 2d 883—The income was to be paid to the donor or to another party to be designated by the donor to be used by such dis-

tributee for the support, maintenance, and education of the grandchild in such manner as the distributee in his sole discretion deemed best. Thus, the trustee was not only not required to expend the income for the beneficiary but could not even compel the distributee so to do.

Commissioner vs. Phillips' Estate, 126 F. 2d 851—The trust agreement provided that it should not be obligatory or mandatory on the trustee to pay any income or allowance to said beneficiaries prior to the death of the donor or prior to the expiration of ten years from the date of trust agreement. Of course, this was a gift of a future interest from which no use or enjoyment might ever come to any beneficiary.

It is conceded, however, that there are decisions supporting the majority view, but it is submitted that these decisions were in cases dissimilar from the present, or where the Court failed to take into consideration the fact that the "use and enjoyment" can only mean such use and enjoyment as the donee is at the time capable of exercising, thereby rendering it necessary for the intervention of a third party or trustee to hold, use, and possess for [fol. 80] such donee, which in law is use and possession for and by the donee *in praesenti* and not *in futuro*.

In the present case the trustees were to use both the income and the corpus for the best interest of the beneficiaries, it being hoped it would not be necessary to spend the child's estate. The trustee was expected to do no more than would a guardian have been expected to do. The child's welfare was the *summum bonum* of the trust.

The vesting of a gift can be made dependent upon the discretion of a trustee if the language of the trust instrument leaves the matter to the sole discretion of the trustee, but in the present trust instrument the test is the need, comfort, and welfare of the beneficiary. The discretion of the trustee is far from absolute. The trustee here could not withhold support from one of his necessitous *cestuis que trust*, without plainly violating his trust, and this equity would prevent.

The fact that death might intervene before the *cestui que trust* comes into full possession of the entire gift does not make the entire gift one of future interest, and the statute does not make provision for a *pro tanto* tax. A present gift to a trustee for the use of another is a present

gift to that other, and a donor does not have to abolish death in order to make a managed gift to an infant.

I hesitate to ascribe to Congress the absurd design to tax a gift to a babe in arms because his estate must be [fol. 81] managed by someone *sui juris*, exercising the powers of a guardian or parent, while a gift to an adult, requiring no managing third party, is tax free. Congress likes adult voters, but surely not that well.

[fol. 82] JUDGMENT

Extract from the Minutes of March 3, 1944.

No. 10829

ELLA F. FONDREN and the ESTATE of W. W. FONDREN, deceased, ELLA F. FONDREN, Independent Executrix,

versus

COMMISSIONER OF INTERNAL REVENUE

This cause came on to be heard on the petition of Ella F. Fondren and the Estate of W. W. Fondren, deceased, Ella F. Fondren, Independent Executrix, for a review of decisions of The Tax Court of the United States, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decisions of the said Tax Court of the United States in this cause be, and the same are hereby, affirmed.

"Waller, Circuit Judge, dissents."

[fol. 83] No. 10829

[fol. 83] In the United States Circuit Court of Appeals for the Fifth Circuit

No. 10829

Ella F. Fondren and the Estate of W. W. Fondren, Deceased, Ella F. Fondren, Independent Executrix, Petitioners,

v.

Commissioner of Internal Revenue, Respondent.

Motion for Stay of Mandate

To the Honorable Circuit Court of Appeals for the Fifth Circuit:

Now come Petitioners, Ella F. Fondren, and the Estate of W. W. Fondren, Deceased, Ella F. Fondren, Independent Executrix, and pray the Court that it grant Petitioners a stay of the Mandate to issue from this Court to the Honorable The Tax Court of the United States in above styled and numbered cause pending the filing by Petitioners of their Application to the Supreme Court of the United States for Writ of Certiorari therein. Petitioners pray that such stay of Mandate be granted for a period of thirty (30) days from and after March 24, 1944 which date is the 21st day after rendition and entry of judgment therein by this Court.

Ella F. Fondren, and Estate of W. W. Fondren, Deceased, Ella F. Fondren, Independent Executrix, by W. M. Cleaves, Attorney, Petitioners.

State of Texas,
County of Harris:

On this day personally appeared before me, the undersigned authority, W. M. Cleaves, attorney who signed above Motion, and on oath did depose and say that before submitting same to the Court a true copy thereof was mailed by registered mail to the Honorable Mr. J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Washington 25, D. C.

Certified under my hand and seal of office this 18th day of March, 1944.

W. S. Cleaves, Notary Public in and for Harris County, Texas. (Seal.)

[fol. 84] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10829

ELLA F. FONDREN and the ESTATE OF W. W. FONDREN, deceased, ELLA F. FONDREN, Independent Executrix, Petitioners,

versus

COMMISSIONER OF INTERNAL REVENUE, Respondent

On consideration of the application of the Petitioners in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Petitioners to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 22nd day of March, 1944.

(Signed) E. R. Holmes, United States Circuit Judge

[fol. 85] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 86] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied

No. 1011 88

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

ELLA F. FONDREN AND THE ESTATE OF W. W. FONDREN, DECEASED,
ELLA F. FONDREN, INDEPENDENT EXECUTRIX,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

E. E. TOWNES,
W. M. CLEAVES,
Attorneys for Petitioners

ALPHA LAW BRIEF CO., HOUSTON

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

ELLA F. FONDREN AND THE ESTATE OF W. W. FONDREN, DECEASED,
ELLA F. FONDREN, INDEPENDENT EXECUTRIX,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Ella F. Fondren and the Estate of W. W. Fondren, deceased, Ella F. Fondren, Independent Executrix, by their attorneys E. E. Townes and W. M. Cleaves, pray that a Writ of Certiorari issue to review the decision of the United States Circuit Court of Appeals for the Fifth Cir-

cuit, entered March 3, 1944, in Case No. 10829 below, affirming the judgment of The Tax Court of the United States in the above entitled case (same being Numbers 107,473 and 107,474 as originally filed in The Tax Court of the United States and consolidated for decision purposes by said Court).

Summary and Short Statement of Matters Involved

On December 2, 1937, W. W. Fondren and Ella F. Fondren each made seven separate gifts to each of seven irrevocable trusts. Each of the several trusts had been created for a specifically named grandchild and each gift consisted of 100 shares of Humble Oil & Refining Company stock then of the fair market value of $5,975.00. In preparing and filing their 1937 gift tax returns and paying their respective gift taxes for such year, the respective donors considered the several gifts to be gifts of present interests and accordingly claimed the benefit of the $5,000.00 annual exclusion as to each gift.

Upon his examination of the gift tax returns, the Gift Tax Examiner treated the several gifts as gifts of future interests and therefore disallowed the annual exclusion deductions and assessed deficiency gift taxes on the basis of such disallowance.

Taxpayers thereupon filed their petition with The Tax Court of the United States (then known as The United States Board of Tax Appeals), asking for a redetermination of the deficiency tax on the ground that the several gifts were, in fact, gifts of present interests and the $5,000.00 annual exclusion as to each gift constituted a proper deduction for gift tax purposes.

In due time The Tax Court of the United States promulgated its decision holding that the gifts were gifts of future

interests and denying the annual exclusion deductions. In due time petition for review was filed by taxpayers in The Circuit Court of Appeals for the Fifth Circuit, and under date March 3, 1944, said Circuit Court of Appeals entered its judgment affirming the decision of The Tax Court of the United States.

This petition for Writ of Certiorari has as its purpose the review of this cause by the Supreme Court of the United States and the promulgation by such Court of the sound rule of decision proper to be applied to gifts in trust for the benefit of minors.

Opinions Below

The opinion of The Tax Court of the United States is reported in 1 T.C. 1036, and appears in this record at pages 29-36. The opinion of the Circuit Court of Appeals is reported in 44-1 U. S. T. C., Par. 10096, 141 Fed. (2d) —, appears in this record at pages 72-81.

The opinion of the Circuit Court of Appeals was by JUSTICE MCCORD and was concurred in by JUSTICE SIBLEY with dissenting opinion by CHIEF JUSTICE WALTER.

Jurisdiction of the Court

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended, 28 U.S.C.A. 347(a).

Questions Presented

1. Were the several gifts made in trust by W. W. Fondren and Ella F. Fondren respectively on December 2, 1937, to seven irrevocable trusts each of which trusts was created for the benefit of a specifically named grandchild then in being and of tender years, gifts of future interests to the respective

grandchildren within the meaning of Subdivision (b) of Section 504 of the Revenue Act of 1932 as then effective, where each of the trust indentures expressly provided

a. That the trust was created for the specifically named grandchild,

b. That the purpose of the trust was to provide for the personal comfort, support, maintenance and welfare of the specifically named grandchild,

c. That the specifically named grandchild should be properly maintained, educated and supported, and made it the duty of the trustee to see that this obligation should be properly and reasonably discharged, and for such purpose authorized the use of the entire trust estate both income and corpus?

2. Were the several gifts made in trust by W. W. Fondren and Ella F. Fondren respectively on December 2, 1937, to seven irrevocable trusts each of which trusts was created for the benefit of a specifically named grandchild then in being and of tender years, gifts of present interests to the respective grandchildren within the meaning of Subdivision (b) of Section 504 of the REVENUE ACT of 1932 as then effective, and therefore entitled to the annual exclusions provided in said Revenue Act, where each of the trust indentures expressly provided

a. That the trust was created for the specifically named grandchild,

b. That the purpose of the trust was to provide for the personal comfort, support, maintenance and welfare of the specifically named grandchild.

c. That the specifically named grandchild should be properly maintained, educated and supported, and made it the duty of the trustee to see that this obligation should be properly and reasonably discharged, and for such purpose authorized the use of the entire trust estate, both income and corpus?

Statutes and Regulations Involved

At the time the gifts under consideration were made, the applicable provisions of the REVENUE ACT and REGULATIONS read as follows:

Subdivision (b) of Section 504 of the REVENUE ACT of 1932, read,

> (b) Gifts Less Than $5,000.00.—In the case of gifts (other than future interests in property) made to any person by the donor during the calendar year, the first $5,000.00 of such gifts to such person shall not, for the purposes of Subsection (a), be included in the total amount of gifts made during such year.

Article 11 of REGULATION 79 (1936 Edition), read,

> "Future interests" is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time.

Reasons for Granting the Writ

First—The decision below, in holding that the gifts under consideration were gifts of future interests, cites as its authority the decisions of this Honorable Court in the cases of UNITED STATES v. PELZER, 312 U.S. 399, and RYERSON v. UNITED STATES, 312 U.S. 405, and stems either from a misunderstanding of the effect of such decisions or from an unwarranted extension of the legal principles announced therein.

Second—The decision below, in holding that the gifts under consideration were gifts of future interests, is in conflict with the following decisions:

(a) The decision of the United States Circuit Court of Appeals for the Eighth Circuit in the case of SMITH v. COMMISSIONER, 131 Fed. (2d) 254.

(b) The decision of the United States Circuit Court of Appeals for the Seventh Circuit in the case of SENSENBRENNER v. COMMISSIONER, 134 Fed. (2d) 883.

(c) The decision of the District Court of the United States for the Northern District of California, Southern Division, in the case of KINNEY v. ANGLIM, 43 Fed. Supp. 431.

Third—The question of whether or not gifts such as those now under consideration are gifts of future interests will most certainly present itself in innumerable cases with the result that litigation and settlement of these many cases will be prolonged unless this Writ of Certiorari is granted and the sound principle of decision authoritatively and finally promulgated. A question of unusual importance in tax law is involved, and both our citizenship and the Treasury Department are entitled to have the question settled by a decision of this Court.

Fourth—The decision below, in holding that the gifts under consideration were gifts of future interests, is intrinsically wrong and will operate to multiply and prolong litigation until the correct rule of decision is announced by this Court.

Wherefore it is respectfully submitted that this Court should grant the Writ of Certiorari to review the decision of

The Circuit Court of Appeals for the Fifth Circuit in Cause No. 10829 below.

E. E. TOWNES,
W. M. CLEAVES,
Attorneys for Petitioners

Of Counsel

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

ELLA F. FONDREN AND THE ESTATE OF W. W. FONDREN, DECEASED,
ELLA F. FONDREN, INDEPENDENT EXECUTRIX,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Statement of Facts

The seven trust indentures were, for all purposes of the instant case, of identical terms and provisions, saving and excepting only that each indenture named one grandchild as beneficiary thereof.

The following brief references to the provisions of the trust indenture naming Wash Bryan Trammell, Jr., as beneficiary are illustrative of all the trust indentures and form a basis for a correct understanding of the issues in this case.

The opening lines of the indenture read as follows:

> "KNOW ALL MEN BY THESE PRESENTS: that we, W. W. Fondren and his wife, Ella F. Fondren, of the State of Texas and County of Harris, and hereinafter referred to as Grantors, do hereby make, establish, publish, and declare a trust and gift for our Grandson, Wash Bryan Trammell, Jr., the son of our daughter, Sue Fondren Trammell, upon the terms, conditions and with the limitations hereinafter set forth, and for the purposes and objects herein expressed; and in consideration thereof, and in consideration of the love and affection which we bear to our said Grandson, we have granted, assigned, transferred, set apart and conveyed, and by these presents do grant, assign, transfer, set apart and deliver, to W. W. Fondren, as Trustee, and only in his capacity as Trustee, and to his successor and successors as such Trustee, all of the property described in 'Exhibit A' which is hereto attached."

Article One of the trust indenture after authorizing augmentations of the trust estate provided that

> "such additional property so assigned, transferred and delivered shall constitute and immediately be and become part of the trust fund hereby created for the benefit of our said Grandson, and shall be in all things controlled, handled, managed and disposed of in accordance with the provisions of this instrument;"

The first four paragraphs of Article Three of said indenture read as follows:

"Out of the trust estate hereby created and as the same may hereafter be augmented and increased by gift from the Grantors or either of them as herein provided for, or from any other source whatsoever, the Trustee shall provide for the support, maintenance and education of our said Grandson, using only the income of said estate for that purpose if it be sufficient. If it be necessary to use any of the corpus of the estate for that purpose and in the judgment of the Trustee it is best to do so, said Trustee may make advancements out of the corpus of said trust estate for such purpose for the benefit of our said Grandson.

"It is contemplated, however, that our said Grandson will have other adequate and sufficient means of support, and that it will not be necessary to use either the income or the corpus of the trust estate hereby created to properly provide for his education, maintenance and support; and, if the income from the trust estate be not needed for these purposes, then all of the income from said trust estate not so needed shall be by the Trustee passed to capital account of said trust estate, and shall be and become a part of said trust estate, it being our hope that all of the earnings and income of said trust estate during the period of this Trust may be used to augment the trust estate and be delivered to our said Grandson at the periods herein provided for. It is expressly provided, however, that our said Grandson shall be properly maintained, educated and supported, and if it be necessary to use all of the income and even all of the corpus of the trust estate hereby created and all augmentations thereof, it shall be the duty of the Trustee to see that this obligation shall be properly and reasonably discharged.

"This trust shall endure and continue until our said Grandson attains the age of twenty-five years, at which time the Trustee then acting shall deliver to him twenty-five per cent (25%) of said trust estate and its accumulations, if any, and shall retain the remainder thereof until our said Grandson shall attain the age of

thirty years, when the Trustee shall deliver to him thirty-three and one-third per cent (33 1/3%) of the total amount of said estate then in his possession, including also the accumulations thereof; and the remainder of said estate shall be continued thereafter until our Grandson shall reach the age of thirty-five years, at which time all of said trust estate remaining in the hands of the Trustee shall then be delivered to our said Grandson. These deliveries, however, are conditioned upon and subject to the continued life of our said Grandson until each such period is reached.

"If our said Grandson, Wash Bryan Trammell, Jr., shall die leaving issue him surviving, before all of said trust estate shall be delivered to him, the said Wash Bryan Trammell, Jr., then said trust estate then held by the Trustee shall be held and administered by the Trustee for the benefit of such surviving issue of the said Wash Bryan Trammell, Jr., and shall be delivered to such issue, share and share alike, when the youngest of such issue shall attain the age of twenty-one years. If our said Grandson shall die without issue before the trust estate is finally delivered in full to him under the terms hereof, then all of the trust estate in the hands of the Trustee at the time of his death shall be held and administered by the Trustee for the use and benefit of our Granddaughter Sue Trammell, and shall be distributed to her in the same manner, and at the same periods of her age as herein provided for our said Grandson Wash Bryan Trammell, Jr.; and if she, the said Sue Trammell, shall die before said estate is delivered to her by the Trustee under the terms hereof and leave issue her surviving, said estate shall be held and administered by the Trustee for the benefit of such issue, and when the youngest of such issue shall attain the age of twenty-one years said estate shall be delivered to such issue share and share alike. If the said Sue Trammell shall die without issue, however, before the distribution of said trust estate is completed, the amount then in the hands of the Trustee shall descend to and be distributed to her heirs under the laws of the State of Texas."

The first sentence of Article Five of the trust indenture reads as follows:

> "The purpose in creating this trust is to provide for the personal comfort, support, maintenance and welfare of our said Grandson."

The third paragraph of Article Six of the trust indenture reads as follows:

> "Said designation of a new Trustee may be made whenever and as often as the Grantors herein named or the survivor of them shall deem it to the best interests of the trust estate; but it is distinctly understood, however, that this trust is absolutely irrevocable, and the Grantors reserve no rights in themselves to any interest in said trust estate, nor to any income therefrom, nor to any increase thereof, of any kind or character whatsoever, and reserve no control over the same except under the terms of this Trust as Trustees, and reserve to themselves no defeasance of said trust estate under any terms, conditions or circumstances whatsoever; and that whenever W. W. Fondren or Ella F. Fondren is acting as Trustee of said Estate all acts in the control, management and disposition of said estate shall be acts as Trustee and not individually, it being distinctly provided that the Grantors have no individual interest of any kind or character in, to or unto said trust estate, or any part thereof."

The opening lines of the closing paragraph of the trust indenture read as follows:

> "For the protection, education, support and maintenance of our said Grandson we have made and executed this instrument."

At the date of the making of the gifts under consideration

the ages of the several grandchildren beneficiaries were as follows:

> Mary Doris Fondren was seven years of age;
> Ellanor Anne Fondren was five years of age;
> Sue Trammell was four years of age;
> Peter Fondren Underwood was four years of age;
> Walsh Bryan Trammell, Jr., was two years of age;
> Walter William Fondren, III, was one year of age;
> David Milton Underwood was nine months of age.

II.

Argument

***First Proposition*—The decision of the Circuit Court of Appeals for the Fifth Circuit in the instant case is in no proper sense supported by the decision of this Court in either *United States v. Pelzer*, 312 U.S. 399, or *Ryerson v. United States*, 312 U.S. 405.**

In the case of UNITED STATES V. PELZER (supra) the court was considering the nature of certain gifts in trust made during the calendar years 1933, 1934 and 1935. The trust to which the gifts were made was created in 1932 and eight then living grandchildren and all after born grandchildren were designated as beneficiaries. No distributions out of either income or corpus were authorized to be made prior to 1942, and distributions subsequent to such date were to be made ratably among such grandchildren as might be living on the date of the particular distribution. The decision was:

(1) That the eight grandchildren were the persons to whom the gifts were made, and

(2) That since the donees had no "right to the present

> enjoyment of the corpus or of the income and unless they survived the ten-year period they will never receive any part of either" the gifts constituted gifts of future interests.

In the case of RYERSON v. UNITED STATES (supra) two different trusts were involved, one created by trust indenture executed in 1933 and the other by trust indenture executed in 1934.

The 1933 trust indenture provided that the trust estate could be distributed to the two trustees by their own joint action, and also provided for the termination of the trust by one trustee in case of the death or mental incapacity of the other trustee, with the further provision that one-fourth of the net income should be distributed to a named beneficiary so long as she should live, with the remainder over to other designated parties for life. The other three-fourths of the income was to be accumulated; and, in the absence of earlier termination, the entire trust estate was to be finally distributed upon the death of the last survivor of three named parties.

The 1934 trust indenture provided that upon the death of the grantor the trust estate should be distributed in designated ways among those members of a group who might be then living.

The gift to each of these two trusts constituted a single premium insurance policy on the life of the donor with the result that not even the corpus of the trust, let alone any income therefrom, would be available to any beneficiary until after the death of the donor.

The decision was that since

> "all those who might become entitled to the use and enjoyment of the trust, principal and income, were ascertainable only upon the happening of one or more uncertain future events"

the gifts as to all donees constituted gifts of future interests within the meaning of the Federal Gift Tax statute and the Treasury regulations promulgated in conformity thereto.

The statutes and regulations applicable to the instant case are identical with the statutes and regulations as applied in UNITED STATES v. PELZER (supra) and RYERSON v. UNITED STATES (supra); but the facts of the instant case are utterly dissimilar to the facts in these other cases in that here we are dealing with a trust which was created for one specifically named grandchild and it was made the express duty and obligation of the trustee to see that such grandchild was properly protected, educated, supported and maintained.

It is important to note that in UNITED STATES v. PELZER (supra) no right to enjoyment of either corpus or income would ever vest in any beneficiary unless such beneficiary survived the ten-year period, and that in RYERSON v. UNITED STATES (supra) the identity of those who might become entitled to the benefits of the trust depended upon the happening of uncertain future events. It is respectfully submitted that the basic inquiry in these cases should not be what use, possession and enjoyment the beneficiary may ultimately appropriate, but rather what is such beneficiary's vested and fixed right today; and it is apparent that the Circuit Court of Appeals in the instant case has failed to keep in mind this fundamental and controlling difference between actual use and the right to use. The determinative factor should be the existence of the present right or title and not the possibility or extent of actual appropriation.

Second Proposition*—The decision of the Circuit Court of Appeals for the Fifth Circuit in the instant case is in conflict with the decisions in *Smith v. Commissioner*, 131 Fed. (2d) 254; *Sensenbrenner v. Com-

***missioner*, 134 Fed. (2d) 883, and *Kinney v. Anglim*, 43 Fed. Supp. 431.**

In SMITH v. COMMISSIONER (supra), decided by the Circuit Court of Appeals for the Eighth Circuit, one trust had been created for trustor's two grandchildren. The trust indenture provided for final distribution to each grandchild upon his reaching twenty-four years, but contained the following express provisions with reference to earlier distributions:

> "Trustee shall be and is empowered and directed, in his sole discretion, to use the principal and income from said Estate for the purpose of the education and preparation of said beneficiaries to attain and occupy an advantageous and desirable position in life."
>
> "The Trustee is authorized and directed to expend any or all of the principal sum of said Estate, as in his judgment and discretion may be found necessary, for the personal care and maintenance of said beneficiaries herein, and is authorized to provide, furnish and pay for any or all professional or medical services or attendants, during any illness of beneficiaries."

The decision was that the gifts to the grandchildren beneficiaries were gifts of present interests.

In the instant case there is a complete absence of discretionary power on the part of the trustee and the purpose of the Trust to provide a present interest in the beneficiary is most unequivocally expressed.

In SENSENBRENNER v. COMMISSIONER (supra), decided by the Circuit Court of Appeals for the Seventh Circuit, seven trusts had been created for seven grandchildren, the trust indentures providing that during minority of the particular grandchild the income should be paid either to the donor or to another designated party to be used by the distributee for the support, maintenance and education of the

grandchild in such manner as the distributee should in his sole discretion deem best. The decision was that the gift was a gift of a present interest.

How much stronger are the facts in the instant case where, in lieu of making the benefit to the grandchild depend on the uncontrolled discretion of the donor or a third party, as in the SENSENBRENNER case, the trust indenture makes it the express duty of the trustee to apply both corpus and income to the proper comfort and welfare of the specifically named grandchild beneficiary.

In KINNEY v. ANGLIM (supra), decided by the District Court of the United States for the Northern District of California, the trust had been created for trustor's three granddaughters with provision for final distributions when the granddaughters should attain the ages of twenty-one and thirty years. The income to the trust was to be paid to the mother of the particular granddaughter until the latter should reach the age of twenty-one years. The decision was that the gifts to the three granddaughters were gifts of present interests notwithstanding that during minority distributions were to be made to the mother and not to the granddaughter.

In the instant case there is no question either as to the purpose of the trust or as to the identity of the party to whom and for whose benefit distributions are to be made, and no discretionary power is vested in the trustee.

In connection with this matter of conflict with other cases, it is important to keep in mind that the opinion of the Circuit Court of Appeals in the instant case was by a divided court and that, in a most vigorous dissenting opinion, CHIEF JUSTICE WALLER specifically pointed out the substantial weakness of the majority opinion and effectively differentiated all cases cited by JUSTICE MCCORD as supporting his majority opinion.

***Third Proposition*—The instant case involves a question of unusual importance in tax law and unless and until the sound principle of decision is established by this Court much unnecessary and prolonged litigation will occur,**

Throughout the entire history of American jurisprudence trusts for minor beneficiaries have both received and merited most cordial and sympathetic consideration; and the creation of such a trust has been recognized as a most laudable and praiseworthy act. In few undertakings has one been permitted more unalloyed satisfaction than to thus assure to some small child those things that make for a strong body, a trained mind and an unfettered spirit. As a result of this attitude thousands upon thousands of such trusts have been created, some before the incidence of the gift tax statute and some subsequent to the passage of the gift tax law, but all having as their dominant purpose the present and or future welfare of the object of the beneficence.

In the preparation of trust indentures unusual care is exercised to clearly set forth both the purposes of the particular trust and the safeguards which are considered proper for the reasonable protection of the trust estate, but on account of diversity of authorship the phraseology of each particular instrument is more or less unique and distinctive. It therefore follows that in the absence of some established rule of decision as to the question now under consideration, no one, be he layman or counsellor, can speak with assurance.

The instant case offers an admirable basis for an examination into the legal principles which apply to gifts in trust for minor beneficiaries, and also for the promulgation by this Court of the sound rule of decision in a case where the immediate and continuous protection of the minor beneficiary is the dominant and controlling purpose of the trust

and the trustee is vested with no discretionary power within the proper meaning of the said term as applicable to trust indentures. It is therefore most earnestly submitted that the reexamination by this Court of the decision in this case as announced by the Circuit Court of Appeals for the Fifth Circuit is, from the standpoint of our general jurisprudence, greatly to be desired, and will have as its result, not only the clarification of the rule of decision, but also the avoidance of much unnecessary and prolonged litigation.

***Fourth Proposition*—The decision of the Circuit Court of Appeals for the Fifth Circuit is intrinsically wrong and will operate to multiply and prolong litigation until the correct rule of decision is announced by this Court.**

Each of the trusts under consideration was unqualifiedly irrevocable and with no defeasance, reversion or other benefit retained by the donor. Each specifically named grandchild was given the largest use, possession and enjoyment possible to be sensibly given to a child of tender years, and the donation was made in the most approved method, indeed, the only practicable method in the absence of resort to legal guardianship with its attendant expense and inconvenience.

The gifts, immediately they were made, were presently available for the needs of the respective grandchildren, with no power or discretion vested in the Trustee or any other party to deny or withhold the use, possession or enjoyment by the beneficiary; and to hold these gifts to be gifts of future interests is in effect to hold that no gift in trust of a present interest can be made to a minor beneficiary, if the trust indenture contains those ordinary provisions which human experience has shown are necessary to insure the proper and reasonable protection of the trust estate. It is submitted that such a discrimination against trusts for minor

beneficiaries was never intended by Congress, is entirely unwarranted and out of harmony with all fundamental principles of taxation and trust law, and should not be indulged.

Respectfully submitted,

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Attorneys for Petitioners

Of Counsel

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 88

ELLA F. FONDREN AND THE ESTATE OF W. W. FONDREN, DECEASED, ELLA F. FONDREN, INDEPENDENT EXECUTRIX, *Petitioners*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONERS IN REPLY

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BRIEF FOR PETITIONERS IN REPLY

Regulation Involved

Petitioners recognize both the fundamental soundness and binding effect of TREASURY REGULATIONS 108, Sec. 86.11 (formerly Article 11 of TREASURY REGULATIONS 79, 1936 edition) to the effect that

> " 'future interests' is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a par-

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ticular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time."

The issue in the instant case is whether or not, under the trust instruments involved, the gifts to the minor beneficiaries are gifts of future interests, and this issue in turn involves an answer to the question as to whether or not the gifts were

"limited to commence in use, possession or enjoyment at some future date or time."

Discussion of Cases

Petitioners furthermore recognize that the decision in each of the cases cited by Respondent (page 7 of opposing brief) is amply supported by and in harmony with said Sec. 86.11; and while it is not deemed proper in this brief to go into an extended discussion of the cases, it is considered proper to make the following brief observations.

The cases fall logically into the following categories:

1. Cases holding that a gift in trust is a gift of a future interest where the right of the beneficiary to the use, possession or enjoyment is postponed so as to begin at some fixed future date.

   (a) FISHER v. COMMISSIONER, 132 F. (2d) 383 (C.C. A. 9th). In this case the gift of corpus was held to be a gift of a future interest because it was distributable when the beneficiary reached twenty-five years of age.

   (b) SENSENBRENNER v. COMMISSIONER, 134 F. (2d) 883 (C.C.A. 7th). In this case the gift of corpus was held to be a gift of a future interest because it was distributable only at the termination of the trust.

2. Cases holding that a gift in trust is a gift of a future interest where the right of the beneficiary to the use, possession or enjoyment is postponed to begin either at, or by reference to, the happening of some future event.

   (a) COMMISSIONER v. GLOS, 123 F. (2d) 548 (C.C.A. 7th), and HOPKINS v. MAGRUDER, 122 F. (2d) 693 (C.C.A. 4th). In these cases the gifts were held to be gifts of future interests because no distribution could be made until after the death of donor.

   (b) HOWE v. UNITED STATES (C.C.A. 7th), decided April 25, 1944 (1944—P-H, Par. 62,533). In this case the gift of the corpus was held to be a gift of a future interest for the reason that distributions thereof could be made only upon the majority vote of the seven beneficiaries.

3. Cases holding that a gift in trust is a gift of future interest where the right of the beneficiary to the use, possession or enjoyment is postponed to either begin or be dependent upon the discretionary determination of some party other than the beneficiary.

   (a) HOWE v. UNITED STATES (C.C.A. 7th), decided April 25, 1944 (1944 P-H, Par. 62,533). In this case the gift of income to the trust was held to be a gift of a future interest because distributions thereof could be made only, if in the judgment of the trustees, such income should not be needed for taxes or other obligations.

   (b) COMMISSIONER v. GARDNER, 127 F. (2d) 929 (C.C.A. 7th). In this case the gift was held to be gift of a future interest because distributions were to be made only to the extent that the trustee should deem necessary and proper for the education, support and maintenance of the several grandchildren beneficiaries.

(c) FRENCH v. COMMISSIONER, 138 F. (2d) 254 (C.C.A. 8th), and WELCH v. PAINE, 130 F. (2d) 990 (C.C.A. 1st). In these cases the gifts were held to be gifts of future interests because the trustee was authorized in his discretion either to distribute or accumulate income.

(d) COMMISSIONER v. PHILLIPS' ESTATE, 126 F. (2d) 851 (C.C.A. 5th). In this case the gift was held to be a gift of a future interest because distributions were to be made at the discretion of the trustee.

(e) COMMISSIONER v. TAYLOR, 122 F. (2d) 714 (C. C. A. 3d). In this case the gift was held to be a gift of a future interest because distributions were to be made at the sole discretion of the trustee.

(f) HELVERING v. BLAIR, 121 F. (2d) 945 (C.C.A. 2d), and WELCH v. PAINE, 120 F. (2d) 141 (C.C. A. 1st). In these cases the gifts were held to be gifts of future interests because distributions were to be made at the absolute discretion of the trustee.

(g) COMMISSIONER v. BRANDEGEE, 123 F. (2d) 58 (C.C.A. 1st). In this case the gift was held to be a gift of a future interest because the trustee was authorized in his discretion either to pay debts or distribute.

(h) COMMISSIONER v. WELLS, 132 F. (2d) 405 (C.C. A. 6th). In this case the gift was held to be a gift of future interest for the reason that distributions of both income and corpus rested entirely in the discretion of the trustee.

4. Cases holding that a gift in trust is a gift of present interest so far as it concerns income where the income is to be distributed at periods not substantially longer than twelve months.

(a) COMMISSIONER v. LOWDEN, 131 F. (2d) 127 (C. C. A. 7th), and FISHER v. COMMISSIONER,

132 F. (2d) 383 (C. C. A. 9th). In these cases gifts of income were held to be gifts of present interests because income was distributable annually.

(b) SENSENBRENNER v. COMMISSIONER, 134 F. (2d) 883 (C. C. A. 7th). In this case a gift of income was held to be a gift of present interest because it was distributable quarterly.

5. Cases holding that a gift in trust is a gift of present interest where the real purpose of the trust is the protection of a minor beneficiary and under the reasonable construction of the trust indenture no real discretion to grant or withhold is vested either in the trustee or a third party.

(a) SMITH v. COMMISSIONER, 131 F. (2d) 254 (C. C. A. 8th). In this case the gift of income was held to be a gift of a present interest because, notwithstanding the express provision that the trustee was authorized and directed in his sole discretion to make distributions from both principal and income, the controlling and dominant purpose of the trust was the education, maintenance and benefit of the two grandchildren beneficiaries.

(b) KINNEY v. ANGLIM, 43 F. Sup. 431 (N. D. Calif.). In this case the gift was held to be a gift of a present interest to each of the three minor beneficiaries, notwithstanding that during minority distributions were to be made to the mother of the beneficiaries.

Respondent cited the above cases in connection with the statement that

> "the time of vesting legal or equitable title is immaterial";

but the meaning of this expression is not altogether clear. If

it is intended to say that the time of vesting of title is without any significance, the statement would not seem to be entirely accurate. If on the other hand the meaning is that the time of the vesting of title is of itself not determinative of the issue, then the statement is correct and is supported by all the cases, and the only question is as to its application to the case in hand.

Problem of Gifts in Trust For Minor Beneficiary

In the case of a gift in trust it is fundamental that legal title is vested in the trustee immediately the gift is completed. If the trust is a mere naked trust, the equitable title is certainly vested in the beneficiary and, in most jurisdictions, for all practicable purposes, this would be equally true as to the legal title. If, however, the trust is not a naked trust, then, notwithstanding the fact that the legal title is vested in the trustee, there is, immediately the gift is completed, a present equitable right or title vested in the beneficiary, the extent, nature and attributes of which right or title depend upon the purpose and effect of the gift as determined from the trust instrument under sound rules of construction.

In the instant case it would not seem reasonable that there can be any substantial differences of opinion as to the character of the title of the respective beneficiaries. Certainly the trusts were not naked trusts, and neither of the beneficiaries was competent to properly administer or utilize the trust estate for his own account. These administrative functions, and these alone, were therefore necessarily appointed to the trustee.

We come now to a very brief consideration of the specific and determinative issue of whether or not under the trust

now being considered, the use, possession and enjoyment was at the date of gift limited to begin at a future date or time; and this issue must be answered on the basis of the facts existing at the date of the gift and in the light of the purpose of the donor as expressed in the trust instrument.

As indicated above, the outstanding fact is that each beneficiary was a minor of tender years utterly incapable of administering or using the trust property for himself. The dominant purpose of the trust was the benefit and advantage of the specifically named grandchild beneficiary throughout the entire life of the trust. Immediately the trust was created the beneficiary had the assurance and guarantee of food, shelter, education and personal well being; and both principal and income were available to him for these purposes to the full extent of his needs and without any discretion in the trustee or other party to deny or withhold.

It is therefore submitted that, consistent with all decided cases and with both the income tax law and the Treasury Regulations effective when the gifts were made, the fundamentally sound rule of decision is that a gift in trust for the benefit of a specifically named minor beneficiary is a gift of a present interest where the dominant purpose of the trust is the personal well being and advantage of the named minor continuously throughout the entire life of the trust and the accomplishment of such purpose is in no way postponed, conditioned or subordinated to the control or discretion of either the trustee or any other party.

Conclusion

As pointed out in Petitioners' original application, the decision of the Circuit Court of Appeals in the instant case is not supported by any proper understanding of either UNITED STATES v. PELZER, 312 U.S. 399, or RYERSON v.

UNITED STATES, 312 U.S. 405, and is in conflict with the principles applied in SMITH v. COMMISSIONER (supra), SENSENBRENNER v. COMMISSIONER (supra), and KINNEY v. ANGLIM (supra), and under the facts is fundamentally unsound. The Petition for Writ of Certiorari should therefore be granted.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1944

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On Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

BRIEF OF PETITIONERS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 88

ELLA F. FONDREN AND THE ESTATE OF W. W. FONDREN, DECEASED, ELLA F. FONDREN, INDEPENDENT EXECUTRIX,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

On Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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BRIEF OF PETITIONERS

Nature of the Case

This cause involves United States gift tax deficiencies alleged by Respondent to be owing by W. W. Fondren and wife, Ella F. Fondren, for the calendar year 1937.

The question involved is whether or not the several gifts made in trust by W. W. Fondren and Ella F. Fondren respectively on December 2, 1937, to seven separate trusts, each of which trusts named one of the grantors' grandchildren as beneficiary, constituted gifts of future interests to the particular grandchild within the meaning of Subdivision (b)

of Section 504 of the Revenue Act of 1932 as effective at the time said gifts were made.

Brief History of Case to Date

This case is a consolidated case and involves the validity of certain gift tax deficiency assessments originally complained of by Petitioners in two cases filed in The Tax Court of the United States. One of said two cases was numbered 107,-473 on the docket of said The Tax Court of the United States and was styled Ella F. Fondren, Petitioner, v. Commissioner of Internal Revenue, Respondent. The other of said two cases was numbered 107,474 on the docket of said court and was styled Estate of W. W. Fondren, Deceased, Ella F. Fondren, Independent Executrix, Petitioner, v. Commissioner of Internal Revenue, Respondent.

The two cases next above referred to were upon hearing by The Tax Court of the United States consolidated for decision purposes, and upon decision by said court the consolidated case was duly appealed to The United States Circuit Court of Appeals, Fifth Circuit.

References to Official Reports of Opinions Delivered in the Courts Below

The opinion of The Tax Court of the United States, (R. 28-36) is reported at 1. TC. 1036.

The opinion of the United States Circuit Court of Appeals (R. 71-78) is reported at 141 F. (2d) 419.

Jurisdiction of the Court

The jurisdiction of the Supreme Court of the United States is invoked under Section 240(a) of the JUDICIAL CODE as amended by the Act of February 13, 1925.

Petitioner invokes the jurisdiction of the Supreme Court of the United States under said Section 240(a) for the following reasons:

FIRST—The decision of the United States Circuit Court of Appeals for the Fifth Circuit, in holding the gifts now under consideration to be gifts of future interests, cites the decisions of this Honorable Court in the cases of UNITED STATES v. PELZER, 312 U.S. 399, and RYERSON v. UNITED STATES, 312 U.S. 405, and stems either from a misunderstanding of the effect of such decisions or from an unwarranted extension of the legal principles announced therein.

SECOND—The decision of the United States Circuit Court of Appeals for the Fifth Circuit, in holding the gifts under consideration to be gifts of future interests, is in conflict with the following decisions:

(a) The decision of the United States Circuit Court of Appeals for the Eighth Circuit in the case of SMITH v. COMMISSIONER, 131 Fed. (2d) 254.

(b) The decision of the United States Circuit Court of Appeals for the Seventh Circuit in the case of SENSENBRENNER v. COMMISSIONER, 134 Fed. (2d) 883.

(c) The decision of the District Court of the United States for the Northern District of California, Southern Division, in the case of KINNEY v. ANGLIM, 43 Fed. Supp. 431.

(d) The decision of the United States Circuit Court of Appeals for the Third Circuit in the case of DISSTON v. COMMISSIONER, 144 Fed. (2d) 115.

THIRD—The question of whether or not gifts such as those now under consideration are gifts of future interests

will most certainly be presented in numerous cases, and therefore the promulgation by this Court of the sound principle of decision will obviate much unnecessary and prolonged litigation.

FOURTH—The decision of the United States Circuit Court of Appeals for the Fifth Circuit, in holding the gifts under consideration to be gifts of future interests, is intrinsically wrong and unless corrected by this Court will operate to multiply and prolong litigation until the correct rule of decision is announced by this Court.

Concise Statement of Case

From long prior to March 20, 1930, and continuously until January 5, 1939, the date of the death of W. W. Fondren, the said W. W. Fondren and wife, Ella F. Fondren, lived together as husband and wife and during all of said time maintained their residence and domicile within the State of Texas (R. 43).

Under dates December 17, 1935, December 7, 1936, and December 2, 1937, by formal written instruments duly executed by said W. W. Fondren and Ella F. Fondren before W. O. Manning, Notary Public in and for Harris County, Texas, the said W. W. Fondren and wife, Ella F. Fondren, made, established, published and declared seven (7) certain trusts, and by the terms of each of said formal written instruments constituted the said W. W. Fondren trustee to administer the trusts, with the further provision that upon the death or resignation of said W .W. Fondren the said Ella F. Fondren should succeed to the trusteeship, and with further provisions providing for the appointment of successor trustees, all as in said written instruments expressly provided (R. 43-44).

Of the said seven (7) certain written instruments next above referred to:

> One established a trust for Ellanor Anne Fondren, the daughter of Walter W. Fondren, Jr., and successor beneficiaries as therein provided;
> One established a trust for Mary Doris Fondren, the daughter of Walter W. Fondren, Jr., and successor beneficiaries as therein provided;
> One established a trust for Peter Fondren Underwood, the son of Catherine Fondren Underwood, and successor beneficiaries as therein provided;
> One established a trust for Wash Bryan Trammell, Jr., the son of Sue Fondren Trammell, and successor beneficiaries as therein provided;
> One established a trust for Sue Trammell, the daughter of Sue Fondren Trammell, and successor beneficiaries as therein provided;
> One established a trust for David Milton Underwood, the son of Catherine Fondren Underwood, and successor beneficiaries as therein provided;
> One established a trust for Walter William Fondren, III, the son of Walter W. Fondren, Jr., and successor beneficiaries as therein provided (R. 43).

For all purposes of this cause, all seven (7) of said trust instruments are of substantially the same terms and provisions as are contained in PETITIONER'S EXHIBIT 1-D (R. 51-64), saving and excepting only that the names and genders of the primary beneficiaries of said trusts vary in order to create a different trust for each of the seven primary beneficiaries (Stipulation in connection with Petition for Review, R. 65-66).

The following paragraphs constitute the pertinent provisions of the TRUST INDENTURE dated December 17, 1935, and naming Wash Bryan Trammell, Jr., and his successors as beneficiaries, and which trust indenture constitutes Exhibit

1-D as offered in evidence at the hearing of this cause (R. 51-63).

(a) The opening lines read as follows:

> "KNOW ALL MEN BY THESE PRESENTS: that we, W. W. Fondren and his wife, Ella F. Fondren, of the State of Texas and County of Harris, and hereinafter referred to as Grantors, do hereby make, establish, publish, and declare a trust and gift for our Grandson, Wash Bryan Trammell, Jr., the son of our daughter Sue Fondren Trammell, upon the terms, conditions and with the limitations hereinafter set forth, and for the purposes and objects herein expressed; and in consideration thereof, and in consideration of the love and affection which we bear to our said Grandson, we have granted, assigned, transferred, set apart and conveyed, and by these presents do grant, assign, transfer, set apart and deliver, to W. W. Fondren, as Trustee, and only in his capacity as Trustee, and to his successor and successors as such Trustee, all of the property described in 'Exhibit A' which is hereto attached" (R. 51).

(b) The first four paragraphs of *Article Three* deal with the designation of beneficiaries and read as follows:

> "Out of the trust estate hereby created and as the same may hereafter be augmented and increased by gift from the Grantors or either of them as herein provided for, or from any other source whatsoever, the Trustee shall provide for the support, maintenance and education of our said Grandson, using only the income of said estate for that purpose if it be sufficient. If it be necessary to use any of the corpus of the estate for that purpose and in the judgment of the Trustee it is best to do so, said Trustee may make advancements out of the corpus of said trust estate for such purpose for the benefit of our said Grandson.

"It is contemplated, however, that our said Grandson will have other adequate and sufficient means of support, and that it will not be necessary to use either the income or the corpus of the trust estate hereby created to properly provide for his education, maintenance and support; and, if the income from the trust estate be not needed for these purposes, then all of the income from said trust estate not so needed shall be by the Trustee passed to capital account of said trust estate, and shall be and become a part of said trust estate, it being our hope that all of the earnings and income of said trust estate during the period of this Trust may be used to augment the trust estate and be delivered to our said Grandson at the periods herein provided for. It is expressly provided, however, that our said Grandson shall be properly maintained, educated and supported, and if it be necessary to use all of the income and even all of the corpus of the trust estate hereby created and all augmentations thereof, it shall be the duty of the Trustee to see that this obligation shall be properly and reasonably discharged.

"This trust shall endure and continue until our said Grandson attains the age of twenty-five years, at which time the Trustee then acting shall deliver to him twenty-five percent (25%) of said trust estate and its accumulations, if any, and shall retain the remainder thereof until our said Grandson shall attain the age of thirty years, when the Trustee shall deliver to him thirty-three and one-third percent (33 1/3%) of the total amount of said estate then in his possession, including also the accumulations thereof; and the remainder of said estate shall be continued thereafter until our Grandson shall reach the age of thirty-five years, at which time all of said trust estate remaining in the hands of the Trustee shall then be delivered to our said Grandson. These deliveries, however, are conditioned upon and subject to the continued life of our said Grandson until each such period is reached.

"If our said Grandson, Wash Bryan Trammell, Jr.,

shall die leaving issue him surviving, before all of said trust estate shall be delivered to him, the said Wash Bryan Trammell, Jr., then said trust estate then held by the Trustee shall be held and administered by the Trustee for the benefit of such surviving issue of the said Wash Bryan Trammell, Jr., and shall be delivered to such issue, share and share alike, when the youngest of such issue shall attain the age of twenty-one years. If our said Grandson shall die without issue before the trust estate is finally delivered in full to him under the terms hereof, then all of the trust estate in the hands of the Trustee at the time of his death shall be held and administered by the Trustee for the use and benefit of our Granddaughter Sue Trammell, and shall be distributed to her in the same manner, and at the same periods of her age as herein provided for our said Grandson Wash Bryan Trammell, Jr.; and if she, the said Sue Trammell, shall die before said estate is delivered to her by the Trustee under the terms hereof and leave issue her surviving, said estate shall be held and administered by the Trustee for the benefit of such issue, and when the youngest of such issue shall attain the age of twenty-one years said estate shall be delivered to such issue share and share alike. If the said Sue Trammell shall die without issue, however, before the distribution of said trust estate is completed, the amount then in the hands of the Trustee shall descend to and be distributed to her heirs under the laws of the State of Texas" (R. 54-56).

(c) The first sentence of *Article Five* reads as follows:

"The purpose in creating this trust is to provide for the personal comfort, support, maintenance and welfare of our said Grandson" (R. 57).

(d) The opening lines of the closing paragraph reads as follows:

"For the protection, education, support and main-

tenance of our said Grandson we have made and executed this instrument" (R. 62).

(e) By the terms of *Article Six* the trust created by the TRUST INDENTURE is made *"absolutely and finally irrevocable,"* with no reservation of any right *"to any interest in said trust estate, nor to any income therefrom, nor to any increase thereof, of any kind or character whatsoever, and * * * no defeasance of said trust estate under any terms, conditions, or circumstances whatsoever; and * * * no individual interest of any kind or character in, to, or unto said trust estate or any part thereof"* (R. 58-59). (Italics ours.)

The birthdays of the several grandchildren beneficiaries are as follows (R. 45):

Ellanor Anne Fondren was born July 23, 1932.
Mary Doris Fondren was born March 20, 1930.
Peter Fondren Underwood was born October 1, 1933.
Wash Bryan Trammell, Jr., was born March 10, 1935.
Sue Trammell was born August 5, 1933.
Walter William Fondren III, was born April 29, 1936.
David Milton Underwood was born March 5, 1937.

On or about December 2, 1937, W. W. Fondren and Ella F. Fondren each gave to said W. W. Fondren, Trustee of and for each of said above mentioned seven (7) trusts, one hundred (100) shares of Humble Oil & Refining Company stock, the gift to the David Milton Underwood trust being the first gift to such trust, and the gifts to the respective trusts for the other grandchildren being gifts in augmentation of the respective trust estates as theretofore existing (R. 46).

The fair market value of Humble Oil & Refining Company stock on December 2, 1937, the date on which said gifts to

said respective trusts were made by said W. W. Fondren and Ella F. Fondren, was $59.75 per share so that the fair market value of each of said 100-share gifts was $5,975.00 (R. 46).

W. W. Fondren continued to act as trustee in the administration of each and all of the trusts hereinabove mentioned until his death on January 5, 1939. Upon the death of W. W. Fondren the said Ella F. Fondren succeeded to the trusteeship of each and all of said trusts, as provided for therein, which trusteeship she has continuously since exercised and now exercises (R. 46).

The said beneficiaries, Ellanor Anne Fondren, Mary Doris Fondren, Peter Fondren Underwood, Wash Bryan Trammell, Jr., Sue Trammell, Walter William Fondren, III, and David Milton Underwood are all living at the date of the trial of this cause (R. 47).

At all times subsequent to the creation of the trusts hereinabove specifically referred to the parents of the respective grandchildren beneficiaries have respectively, adequately, and sufficiently provided for the proper and adequate support, maintenance and education of the said beneficiaries, with the result that no part of either income or corpus of either of said trust estates has been distributed, used, or applied to or for the benefit, support, maintenance or education of either of said beneficiaries (R. 47).

In due time said W. W. Fondren and Ella F. Fondren filed in regular course their Gift Tax Returns for the calendar year 1937 and in said Gift Tax Returns showed each of the above referred to gifts to said above referred to seven (7) respective trusts and in connection with each of said gifts in trust the said W. W. Fondren and Ella F. Fondren each claimed the statutory $5,000.00 annual exclusion and therefore respectively reported as to each of said gifts a taxable gift for the year 1937 in the amount of $975.00 representing

the difference between the annual $5,000.00 exclusion and the fair market value of the particular gift; to-wit, $5,-975.00. Said W. W. Fondren and Ella F. Fondren then in regular course paid gift taxes on the basis of the taxable gifts so reported by them respectively as to each of said respective trusts (R. 47-48).

In determining the 1937 gift tax deficiencies which are involved in these proceedings, the Commissioner disallowed as to each petitioner the seven exclusions of $5,000.00 each (or total disallowed exclusions of $35,000.00 as to each petitioner) which had been claimed by petitioners on account of gifts above referred to. In his deficiency notice disallowing these exclusions, the Commissioner made the explanation that said gifts constituted gifts of future interests in property against which no exclusions are allowable (R. 49).

The fair and reasonable cost of support, maintenance and education of each of the grandchildren beneficiaries in accordance with the standard of living to which they were accustomed prior to and during the year 1937 would reasonably be not less than $750.00 (R. 67).

W. W. Fondren left a will naming Ella F. Fondren Independent Executrix of his Estate and in due time she made application to the Probate Court of Harris County, Texas, for the probate of said will and for letters testamentary. In due course the will was admitted to probate and Ella F. Fondren appointed and qualified as Independent Executrix of the Estate of W. W. Fondren, Deceased, in which capacity she now acts (R. 47).

SPECIFICATIONS OF ERROR

First Assignment of Error:

The United States Circuit Court of Appeals for the Fifth Circuit erred in holding that the gifts

under consideration constituted gifts of future interests.

Second Assignment of Error:

The United States Circuit Court of Appeals for the Fifth Circuit erred in disallowing the $5,000.00 statutory exclusion in connection with each of the several gifts now under consideration.

Summary of Argument

The judgment and decision of the United States Circuit Court of Appeals for the Fifth Circuit under review herein is erroneous for the following reasons:

I.

Each of the gifts now under consideration, immediately upon its consummation, constituted a gift to the specifically named grandchild beneficiary then in esse.

II.

Each of the gifts now under consideration, immediately upon its consummation, was made to and for the benefit of the specifically named grandchild beneficiary.

III.

Each of the gifts now under consideration, immediately upon its consummation, was available, both income and corpus, to the specifically named grandchild beneficiary for his or her personal comfort, support, maintenance, welfare, protection and education and has continued so available down to the present time.

IV.

At no time subsequent to the making of the gifts now under consideration did any person whomsoever have any right or discretion to withhold from or deny to the specifically named grandchild beneficiary the use, possession or enjoyment of any part of either income or corpus reasonably necessary or proper for the personal comfort, support, maintenance, welfare, protection and education of said grandchild beneficiary.

V.

By no proper construction of the trust instruments now under consideration can it be held that any discretionary power was vested in the trustee or any other person to withhold from or deny to the specifically named grandchild beneficiary the right, immediately upon the consummation of the gift, to demand and receive, primarily from income but secondarily from corpus, each and every distribution proper to be made for the personal comfort, support, maintenance, welfare, protection and education of said specifically named grandchild beneficiary.

VI.

By no proper construction of the trust instruments now under consideration can it be reasonably held that the use, possession and enjoyment of the respective gifts by the specifically named grandchild beneficiary depended upon the survivorship of the particular beneficiary in any different way than the use, possession and enjoyment of property by a fee simple owner thereof is dependent upon the continued survival of such fee owner.

VII.

Neither of the gifts under consideration constitutes either

a reversion, remainder or any other interest or estate limited to commence in use, possession or enjoyment at some future date or time.

VIII.

Each of the gifts now under consideration, immediately upon its consummation, vested in the specifically named grandchild beneficiary all such use, possession and enjoyment as such grandchild beneficiary was capable of exercising at the time of the gift.

IX.

Each of the gifts now under consideration, immediately upon its consummation, vested in the definitely named grandchild beneficiary the fullest use, possession and enjoyment that was possible to be sensibly conferred upon a child of such tender age.

X.

Neither of the gifts under consideration constitutes a gift of future interest within the meaning of any principle announced in either of the following cases:

UNITED STATES v. PELZER, 312 U.S. 399—In this case a gift was held to be a gift of future interest where the gift was made for the benefit of eight living grandchildren and all after born grandchildren, and no distribution was permitted to any beneficiary during the ten year period next succeeding the making of the gift and with distribution after the expiration of said ten-year period to be made only to such beneficiaries as should live to attain the age of twenty-one years.

RYERSON v. UNITED STATES, 312 U.S. 405—In this case the gift of insurance policies on the life of the donor was held to be a gift of future interest where no distribution could be made to a beneficiary unless such beneficiary

should survive the donor and where the trust was subject to be terminated either by the joint action of two of the trustees or by the death or mental incapacity of either of the trustees.

FISCHER v. COMMISSIONER, 132 F. (2d) 383—In this case the gift of the corpus of the trust was held to be a gift of future interest where the gift was made or the benefit of six minor grandchildren and no distribution of the corpus could be made to any beneficiary until such beneficiary should attain the age of twenty-five years.

COMMISSIONER OF INTERNAL REVENUE v. WELLS, 132 F. (2d) 405—In this case the gift was held to be a gift of future interest where the gift was made for the benefit of a minor child and distributions prior to the time when the beneficiary attained the age of twenty-one years were entirely and exclusively in the discretion of the trustee.

SENSENBRENNER v. COMMISSIONER, 134 F. (2d) 883—In this case the gift of the corpus of the trust was held to be a gift of future interest where the gift was made for the benefit of a minor grandchild and no distribution of corpus could be made until a designated future date.

COMMISSIONER v. PHILLIPS' ESTATE, 126 F. (2d) 851—In this case the gift was held to be a gift of future interest where the trustee was authorized, if he should see fit to do so, to make distributions to the beneficiaries in such amounts as such trustee deemed desirable or necessary, and with the discretionary power vested in the trustee to increase or decrease distributions from time to time as he might consider proper.

XI.

Each of the gifts now under consideration, immediately upon its consummation, constituted a gift of a present interest because under any proper construction of the trust instruments the functions of the trustee were the identical func-

tions which a guardian of a minor would ordinarily perform and therefore the use, possession and enjoyment of the trustee was in legal contemplation the use, possession and enjoyment of the minor.

XII.

Each of the gifts now under consideration, immediately upon its consummation, constituted a gift of a present interest because under any proper construction of the trust instruments the gift to the minor grandchild was immediate, definite, absolute and irrevocable, and in no sense dependent upon the happening of any future event either for the determination of the identity of the donee or the quantum of the donation.

Argument

SUBDIVISION A. *Brief Statement Concerning Exclusion Provisions of the Federal Revenue Acts and Regulations*

The First Federal Gift Tax Law was enacted in 1924. It was in no sense an involved statute and levied a graduated gift tax on gifts totalling for any particular tax year in excess of $50,000.00, with a specific limitation that gifts to any one donee totalling $500.00 or less for the particular tax year should be excluded in computing net taxable gifts. The 1924 Act was repealed in 1926, and from the date of such repeal until the effective date of the 1932 Act there was no Federal Gift Tax statute, though during this intervening period numerous questions came before the Treasury Department and the Courts as to the interpretation and application of the 1924 Act.

When the 1932 Act was pending before Congress, the legislative committees had the benefit of the prior experience in the administration of the 1924 Act and as a result of this

experience one important change in the fundamental policy of the law was made, in that the 1932 Act provided for only one specific $50,000.00 exemption in lieu of the annual $50,-000.00 exemptions as authorized by the 1924 Act. In other respects the 1932 Act was of similar pattern with the 1924 Act though in view of the drastic change as to the $50,-000.00 exemption, the policy with reference to small gifts was liberalized to provide for the exclusion of gifts (other than gifts of future interest in property) to one party during taxable year totalling not in excess of $5,000.00. The Committee Reports, Revenue Act of 1932, in referring to the non-exclusion of future interest gifts, is specific to the effect that the $5,000.00 exemption is available only insofar as donees are ascertainable, and that denial of exemption "is dictated by the apparent difficulty, in many instances, of determining the number of eventual donees and the values of their respective gifts."

In the administration of the 1932 Gift Tax Law two questions presented themselves for consideration in connection with gifts in trust. One question was whether the donee of the gift was the trust or the beneficiary of the trust. The other question involved the matter of distinguishing between gifts in trust constituting gifts of present interests and gifts in trust constituting gifts of future interests. An answer was ultimately found to the first question and it is now well settled that for the purposes of the 1932 Gift Tax statute the beneficiary of the trust is the donee.

As to distinguishing between gifts of present and future interests, however, no satisfactory rule had been promulgated by reason of the fact that this matter depends so largely on the wording of the particular trust instrument. In view of this situation the Treasury Department in 1938 presented to Congress for its consideration the advisability of amending

the Federal Gift Tax Law so as to deny exclusion to all gifts in trust.

The 1938 amendment to the Gift Tax statute accomplished this change in the law effective January 1, 1939; and this change continued effective until January 1, 1943, as of which date the Revenue Act of 1942 became operative to again authorize exclusion of gifts in trust if they are other than gifts of future interest.

At the effective date of the gifts under consideration the applicable provisions of the Revenue Act and Regulations read as follows:

> Subdivision (b) of Section 504 of the REVENUE ACT OF 1932, read,
>
> (b) Gifts Less Than $5,000.00—In the case of gifts (other than future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts to such person shall not, for the purposes of Subsection (a), be included in the total amount of gifts made during such year.

Article 11 of REGULATION 79 (1936 Edition), contained the following language:

> "Future interests" is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commerce in use, possession, or enjoyment at some future date or time."

Such was the status of the Federal Gift Tax law and regulations in 1937 when the gifts now under consideration were made.

SUBDIVISION B. *Brief Statement Concerning Fact Situation at Time Gifts Were Made*

W. W. Fondren and wife, Ella F. Fondren, respectively grandfather and grandmother of the seven (7) specifically named beneficiaries, aware of the uncertainty of human affairs and the serious possibility of financial reverse, undertook to provide for their several grandchildren some reasonable measure of security for support, maintenance, education and comfort. At the time the gifts were made each of said grandchildren were of tender years and utterly unable to administer property for themselves, so that it was impossible that any gift could be reasonably made without the intervention of a guardian, trustee or other person to properly protect the interest of the minor beneficiary. It is reasonable to assume that the trustors, after mature consideration and from the standpoint of minimizing expense and inconvenience, decided that it would be much preferable in the creation of the trusts to name themselves as trustees, and the trust instruments under consideration were accordingly so prepared and executed. The purpose of the trusts was most definitely stated and their irrevocability was provided in no uncertain terms.

Even a cursory reading of the trust instruments leads to the conclusion that they were thoughtfully prepared, and what would have been more natural than that these grandparent donors, having concluded that they should act as trustees, would have felt a decided urge to reserve to themselves some discretionary power in the matter of determining whether or not, and the extent to which, distributions to the beneficiary should be made. How easy and how natural it would have been to have inserted in these trust instruments such a provision if such was in fact the intent; and yet how utterly lacking is any such provision.

The word "discretion" appears nowhere in the trust in-

struments, but the whole tenor and declared purpose of each of the several instruments is the welfare of the specifically named grandchild beneficiary.

True it is that the trustors did feel that distributions out of corpus might be of more serious concern than distributions out of income; but even here it is in no sense the discretion of the trustee, but the continued and ample protection of the beneficiary, that is made the test. Necessarily, in the case of a small child, some competent person must be the primary judge as to the necessity and extent of reasonable requirements of the beneficiary; and under the trust instruments as finally executed, the preliminary, but by no means conclusive, determination of this most important matter was confided to the trustee.

The dominant and controlling purposes for which the trusts now under consideration were created are most definitely shown by the following references to the provisions of the trust instruments, to-wit:

1. The opening paragraph provides that the grantors "do hereby make, establish, publish and declare a trust and gift for" the specifically named grandchild.

2. Article Three provides that out of the trust estate hereby created "the trustee shall provide for the support, maintenance and education of" the specifically named grandchild.

3. Article Five provides that "the purpose in creating this trust is to provide for the personal comfort, support, maintenance and welfare of" the particularly named grandchild.

4. The opening lines of the last paragraph read "For the protection, education, support and maintenance of" the particularly named grandchild "we have made and executed this instrument."

SUBDIVISION C. *Discussion*

Preliminary to the examination of the exact nature of the gifts now under consideration it will be helpful to keep in mind that the congressional committee reports show that when Congress was considering the gift tax provisions of the REVENUE ACT of 1932 no suggestion was made that exclusions should be denied in cases of gifts for the benefit of definitely identified beneficiaries in esse at the time of the making of the gifts.

It is also of interest to note that up to the time the gifts under consideration were made Congress had never attempted to deal with gifts in trust on any different basis than other gifts, so that if exclusions are not to be allowed in the instant case the disallowance can be predicated only on the fact that the gifts are gifts of future interests.

It is also to be noted that the only reason ever referred to by the congressional committees for denying exclusion of future interest gifts was the apprehended difficulty of determining the number of eventual donees and the value of their respective gifts.

The several exclusions claimed by your Petitioners refer only to gifts to the specifically named grandchildren beneficiaries, all of whom were in being at the date of the particular gift. There is no question of identity of donee, and no occasion for undertaking to apportion any gift between two or more beneficiaries.

Petitioners recognize that Article 11 of Regulation 79 (1936 Edition) was effective and binding in accordance with its provisions on December 2, 1937, the date of the making of the gifts now under consideration.

Petitioners furthermore admit that if the reasonable construction of the trust instruments is to the effect that the use, possession or enjoyment by the specifically named grandchild beneficiary was to be had only at the discretion of the

trustee, then, under well reasoned authorities, the gifts were gifts of future interests.

In its opinion in the instant case the Tax Court of the United States stated that notwithstanding it was made the express duty of the trustee to see that the specifically named grandchild beneficiary was properly maintained, educated and supported, and if necessary to such end to use both the entire income and corpus of the trust, nevertheless the performance of this duty required the exercise of discretion on the part of the trustee in such sense as to constitute the gifts future interest gifts within the meaning of the revenue act and the applicable regulations; and in support of this conclusion the Court cited the following cases:

> Smith v. Commissioner (C.C.A., 8th Cir.), 131 Fed. (2d) 254;
> Welch v. Paine (C.C.A., 1st Cir.), 130 Fed. (2d) 990;
> Winston Paul, 46 B.T.A. 920;
> Lillian Seeligson Winterbotham, 46 B.T.A. 972;
> Mary M. Hutchings, 1 T.C. 692.

A brief reference to these cited authorities will show that they have no reasonable application to the case in hand.

In SMITH V. COMMISSIONER (supra), the trust instrument expressly provided:

> "Trustee shall be and is empowered and directed, in his sole discretion, to use the principal and income from said estate for the purpose of the education and preparation of said beneficiaries to attain and occupy an advantageous and desirable position in life."
>
> "The Trustee is authorized and directed to expend any or all of the principal sum of said Estate, as in his judgment and discretion may be found necessary, for the personal care and maintenance of said beneficiaries herein, and is authorized to provide, furnish and pay

> for any or all professional or medical services or attendants, during any illness of beneficiaries."

In WELCH v. PAINE (supra) the trusts were created for the trustee's children "now living or hereafter born, in equal shares"; and the trust instruments expressly provided that the trustee could "in his discretion * * * accumulate or withhold and make payments or distributions of shares and income to or for the education or support of any" of the beneficiaries "as the trustee may deem best" with the further provision that in the discretion of the trustee any beneficiary "may be given outright at any time in whole or in part his or her share in the trust figured on the number" of beneficiaries then living.

In WINSTON PAUL (supra) the trust instrument provided that the income was distributable

> "in such proportion as the trustee may in his absolute discretion determine."

In LILLIAN SEELIGSON WINTERBOTHAM (supra) the income was distributable in such proportions as to the trustees

> "shall seem fit and proper * * * (such portion to be determined solely in the judgment and discretion of said Trustees, and without any control over them in the exercise of such judgment or discretion) * * * "

In MARY M. HUTCHINGS (supra) the income could either be accumulated or distributed in the "sole and absolute discretion" of the trustee.

Certainly no one would wish to question the soundness of the decision in either of these cases with the possible exception of the case of SMITH v. COMMISSIONER as to which latter case the criticism of the United States Tax Court in its

opinion in the instant case may be justified. In this case of SMITH v. COMMISSIONER distributions were to be in the "sole discretion" of the trustee, and expenditures of any or all of the corpus were authorized to the extent that in the "judgment and discretion" of the trustee such expenditures might be "found necessary, for the personal care and maintenance of said beneficiaries." But in spite of this unusually strong language, the United States Circuit Court of Appeals for the 8th Circuit held that the discretionary power of the trustee was not such as to permit the trustee to ignore the dominant and controlling purpose of the trust, namely, the well being of the beneficiary, since such a construction would be "tantamount to holding that the trustee might carry out the settlor's directions or ignore them, in accordance with his notion of the proprieties or at his discretion."

In all events these cases, and many others not cited by The Tax Court, firmly establish the rule that the discretionary power of the trustee to control the use, possession and enjoyment by the beneficiary, renders the interest of such beneficiary a future interest within the meaning of the Federal Gift Tax statutes. In all these cases this principle was recognized and applied; in the last four cases to deny exclusions because under the trust instruments involved the discretion of the trustee was held to be controlling, and in SMITH v. COMMISSIONER to uphold the exclusion because, notwithstanding the strong language used, the court was of the opinion that the reasonable interpretation of the entire trust instrument was to make the discretion of the trustee subordinate to the declared purposes of the trust.

How much stronger is the instant case where the purpose of the trust to provide a present interest in the specifically named beneficiary could not have been expressed by more cogent language and where there is a complete absence of discretionary power on the part of the trustee.

There are many other decisions in which the discretionary power of the trustee has been held effective to constitute the gifts in trust gifts of future interest; but in all these cases the powers of the trustee are evidenced by language so clear and definite that there can be no reasonable doubt as to the exercise of discretion by the trustee being made the basis of the beneficiary's rights. We have made a most diligent search of the authorities and the instant case is the only case in the books in which an attempt has been made to find a controlling discretionary power in the trustee where the phraseology of the trust instrument contains neither the word "discretion" nor other comparable term.

In the instant case the majority opinion of the United States Circuit Court of Appeals for the Fifth Circuit contents itself with the statement that the gifts in question are gifts of future interests and that no annual exclusions are allowable and then, without giving any reasons for these conclusions, cites the following cases as supporting the decision.

United States v. Pelzer, 312 U.S. 399;
Ryerson v. United States, 312 U.S. 405;
Fisher v. Commissioner of Internal Revenue, 132 F. (2d) 383;
Commissioner of Internal Revnue v. Wells, 132 F. (2d) 405;
Sensenbrenner v. Commissioner of Internal Revenue, 134 F. (2d) 883;
Commissioner of Internal Revenue v. Phillips' Estate, 126 F. (2d) 851.

Your Petitioners recognize all of these cited cases to be properly decided and to correctly announce the principles of law applicable to their respective facts; but it is most respectfully submitted that neither of these cases nor any rule of decision announced therein can, by any reasonable or proper appli-

cation, support the decision of the Circuit Court of Appeals in the instant case.

In UNITED STATES v. PELZER (supra) the trust was created for ten then living grandchildren of the donor and such other grandchildren as might be thereafter born. No distribution of either income or corpus was permitted to be made until after the expiration of the ten year period next following the making of the gift, and even after the ten year period the distributions were to be made to only those persons who at the time of the particular distribution should comprise the beneficiaries of the trust. The gifts were held to be gifts of future interests.

In RYERSON v. UNITED STATES (supra) the gifts constituted two insurance policies, one to each of two trusts. One trust instrument, executed in 1933, provided that during the life of one of the trustees one-fourth of the net income to the trust should be distributed to such trustee with remainder over for life to her two daughters if surviving at her death, and with further remainders over to their issue per stirpes, but with the further provision that the trust could be terminated by the joint action of the two trustees or by the survivor in the event of the death of one. The other trust instrument, executed in 1934, provided that one-third of the income was to be paid to the widow of trustors' son for life, with remainders over to those persons who would be heirs at law of the son had he died at the same time as the life tenant.

In connection with the 1933 trust instrument the question of the nature of the life interest of the trustee in the one-fourth of the net income to be distributed to her was not properly before the court and therefore is not dealt with in the opinion; but the court specifically decided that the interest of the other daughter, dependent as it was upon the possibility of the prior termination of the trust by the joint action of the two trustees, was a future interest.

In connection with the 1934 trust it was held that the gift was one of future interest because even the gift to the son's widow was contingent upon her surviving the donor at a future date.

In FISHER v. COMMISSIONER OF INTERNAL REVENUE (supra) the trust was for the benefit of donor's six grandchildren and while the income to the trust was to be distributed annually, no distribution of corpus was permitted to be made to any beneficiary until such beneficiary should have attained the age of twenty-five years. The court held that as to income the gift constituted a gift of a present interest but that the postponement of distributions of corpus until the beneficiary should reach the age of twenty-five years made the gift of corpus a gift of future interest.

In COMMISSIONER OF INTERNAL REVENUE v. WELLS (supra) the trust was for the benefit of trustor's two children. The trust indenture named the donor's wife as trustee and provided that the amount of income and principal to be distributed to the beneficiaries should rest entirely in the discretion of the trustee. The court properly held the gifts to be gifts of future interests.

In SENSENBRENNER v. COMMISSIONER OF INTERNAL REVENUE (supra) each of the seven trusts was for the benefit of a particularly named grandchild. The trust instruments provided that during the minority of the particular beneficiary the income to the trust was to be paid either to the donor or to a designated person to be applied by the recipient for the support, maintenance and education of the particular grandchild beneficiary in such manner as the person receiving the payment should in his sole discretion deem best. No distributions of corpus was permitted to be made until the definite future date specifically provided in the trust indenture.

The decision was that the gift of corpus constituted a gift of future interest because its distribution was expressly post-

poned to a fixed future date, but that the gift of income was a gift of present interest notwithstanding that during the minority of the beneficiary no distribution of income was authorized to be made direct to the beneficiary, but such distributions were to be made only to other named parties to be used for the benefit of the minor beneficiary in such way as such distributee in his sole discretion should deem best.

In COMMISSIONER OF INTERNAL REVENUE v. PHILLIPS' ESTATE (supra) the trust was created for the benefit of thirteen beneficiaries, and the trustee was authorized, after paying the expenses incident to the administration of the trust, if he should see fit to do so, to pay to the beneficiaries an allowance in such amount as the trustee might deem desirable or necessary, and with the discretionary power from time to time to increase or decrease said allowance whenever he should deem it to the best interest of the beneficiaries. The trust instrument expressly provided that nothing therein contained should be construed to make it obligatory or mandatory on the trustee to pay any income or allowance to said beneficiaries or any of them prior to either the death of the trustor or the expiration of ten years from the date of the trust indenture, whichever should first occur. The court properly held the gift to be a gift of future interest as to both income and corpus.

Among other enlightening cases dealing with the effect of discretionary power of the trustee are the cases of COMMISSIONER v. TAYLOR, 122 Fed. (2d) 714 (decided August 29, 1941), and DISSTON v. COMMISSIONER OF INTERNAL REVENUE, 144 Fed. (2d) 115 (decided July 12, 1944), and which cases were decided by the United States Circuit Court of Appeals for the Third Circuit.

In the case of COMMISSIONER v. TAYLOR (supra) the trust instrument contained the following provision:

> "the income which may become payable under the terms hereof to any minor child of said John M. Taylor shall be accumulated by Trustees for such child and paid over to such child when he or she shall attain the age of twenty-one years, unless in the opinion of Trustees, in their sole discretion, such income or accumulated income should at any time during the minority of such child be needed for his or her proper education or support, in which event Trustees shall apply any part or all of such income and or accumulated income, as Trustees in their sole discretion may deem expedient, for the education and support of such child during his or her minority."

and the court by majority opinion held that the gifts constituted gifts of future interests. Certainly the phraseology of the trust instrument affords ample support for this decision, but notwithstanding the use of the words "in their sole discretion" CHIEF JUSTICE MARIS felt constrained to write a dissenting opinion wherein he expressed the view that the discretion vested in the trustees was not an arbitrary one, that the authority of the trustees "was conferred upon them solely for the benefit of the minors," and that even under the strong language then being considered the gift "was substantially the same as in the ordinary case of an absolute gift of income to the minor."

In the case of DISSTON V. COMMISSIONER OF INTERNAL REVENUE (supra) two trusts had been created for the benefit of trustor's children and at the time the gifts were made certain of the children beneficiaries were minors.

The trust indentures provided that during the minority of a beneficiary such beneficiary's interest in the income to the trust should be accumulated and paid over to him when he should become twenty-one years of age, but with the express provision that during the minority of any beneficiary the trustee should use for the benefit of the minor such income "as may be necessary for the education, comfort and sup-

port of the respective minors, and shall accumulate for each minor until he or she reaches the age of twenty-one years all income not so needed." This last quoted provision was made expressly superior to the provisions of the trust indenture directing the accumulation of income.

With reference to the distribution of corpus the trust indentures provided that no part of the corpus of the trust should be distributed to a beneficiary until such beneficiary should attain the age of forty-five years; but certain rights of testamentary appointment were vested in the beneficiary prior to his becoming forty-five years of age, and in the absence of such appointment, the trust estate was to pass to his or her descendants and if no descendants to the settlor's other children.

The decision in this case was by divided court. The majority opinion by JONES, C. J., was concurred in by Circuit Judges MARIS, GOODRICH and MCLAUGHLIN. The dissenting opinion was by CIRCUIT JUDGE BIGGS.

The majority opinion discusses at length the provisions of the trust indentures in the light of the decisions in UNITED STATES V. PELZER (supra) and RYERSON V. UNITED STATES (supra), and after reaching the conclusion that these last mentioned cases had no application to the facts then before it, the Court decided that the gifts constituted gifts of present interests and therefore entitled the donor to the annual exclusion provisions of the Revenue Act.

In view of the similarity of the facts in this case of DISSTON V. COMMISSIONER OF INTERNAL REVENUE with the facts in the instant case, and of the fundamental soundness of the principles announced by JUSTICE JONES and his associates, we quote the following excerpts from the majority opinion:

> "the gifts to the minor children were immediate, definite, absolute and irrevocable. In no respect did they depend

upon the happening of an uncertain future event either for the determination of the donees or the quantum of the gifts."

"By direct contrast (the United States v. Pelzer, supra, and Ryerson v. United States, supra) the gifts to the minors in the instant case, which were immediate and absolute, when made, and did not depend upon the donees' survivorship or the happening of any uncertain future event, were gifts of present interests." (Parenthesis inserted by us for explanatory purposes.)

"The provision for the accumulation of income affected neither the identity of the minor donees nor the value of the gifts. At most, the provision was but compliant recognition by the donor of what the law, out of its solicitude for the safeguarding of a minor's property, would have interposed in the absence of the donor's express direction in such regard."

"In the test laid down by Art. 11 of Regulation 79 for determining a future interest, the terms, "use, possession or enjoyment," are used disjunctively. A present possession of an absolute and irrevocable gift is not, therefore, to be submerged by a supposed lack of use or enjoyment which, in turn, rests upon no more than that the income is accumulated for the minor beneficiary during his minority rather than paid directly into his hands."

"We can find nothing in the statute or in its evident purpose (United States v. Pelzer, supra) to warrant imputing to Congress an intent to penalize gifts to minors merely because the legal disability of their years precludes them for a time from receiving their income in hand currently."

"Nor did the authority to the trustees to use, in their sole discretion, the income from the gifts to the minors for their support and education during minority make the income from the gifts any less the minors' property. The discretion was sole only in that it was for the trustees alone to exercise. But, that did not mean that the trustees might exercise the discretion arbitrarily or

capriciously. The discretion was a legal one and, therefore, reviewable by a court of competent jurisdiction for an abuse of its exercise. The discretion thus reposed took nothing away from the absoluteness of the gifts."

"In our opinion an immediate and irrevocable gift to a minor in trust, not dependent for its consummation or continuation upon the happening of uncertain future events, constitutes a transfer of a present interest notwithstanding that the deed of gift provides for the accumulation of the income during the beneficiary's minority and authorizes the use thereof by the trustees, in their sole discretion, for the beneficiary's support and education during minority."

Now let us consider the salient facts of the instant cases in the light of the cases hereinabove referred to.

The first paragraph of Article Three of the trust now under consideration, after specifically providing that "out of the trust estate hereby created * * * the trustee shall provide for the support, maintenance and education of" the particular named grandchild, continues as follows:

"If it is necessary to use any of the corpus of the estate for that purpose and in the judgment of the trustee it is best to do so, said trustee may make advancements out of the corpus of said estate for such purpose for the benefit of our said grandson (granddaughter)."

In construing this language we must keep in mind that when the gifts now under consideration were made the specifically named beneficiaries were respectively from one to seven years of age, and that the paramount and controlling purpose of the several trusts was to provide for the protection, education, support and maintenance of the named grandchildren, and that it was expressly made the duty of the trustee to carry out this purpose. Certainly neither in the light of these definitely announced purposes, nor indeed

from the point of view of common human experience, is it reasonable to find any discretionary power in the trustee as such term is used in the gift tax cases. In these cases discretion means a power to originate the benefit or advantage, to initiate the effectiveness of the beneficence. Freedom of determination and uncontrolled choice is of its essence. The word "judgment" as used in the trust instruments now under consideration has no such connotation. The purpose of the trust and the obligation of the trustee to respect such purpose is clear and unequivocal. The present protection of the grandchild of tender years was assured just as far as it was humanly possible to be accomplished by the use of cogent language. The obligation of the trustee to carry out the purpose of the trust was expressly stated, and the mere fact that there was vested in the trustee the preliminary responsibility to inquire into and evaluate the needs of a small child unable to act on its own account should not reasonably be effective to defeat the declared purpose of the trust.

But respondent contends that the right of the specifically named beneficiary to the use, possession and enjoyment of the trust estate is dependent upon his or her survivorship; and stress is placed upon those provisions of Article Three, in which the trustors expressed the hope that the named beneficiary would "have other adequate and sufficient means of support, and that it will not be necessary to use either the income or the corpus of the trust estate hereby created to properly provide for his (her) education, maintenance and support;" and then provides that if the income should not be needed for the purposes stated it should be passed to capital account as a part of the trust estate.

Keeping in mind that the paramount purpose of the trust was to assure to the specifically named grandchild beneficiaries their protection and well being continuously throughout the period of immaturity from the very instant the trusts were created until the final distribution dates, we appreciate

the fact that this present assurance required that the corpus of the trust be reasonably safeguarded. It was this present assurance of continued well being that formed the controlling purpose of these trusts, and how evanescent and unsubstantial, how utterly invaluable, would have been the right of the beneficiary without some reasonable provision looking to the protection and augmentation of the trust to the extent that such protection and augmentation were consistent with present and continued maintenance and well being of the named beneficiary. It is true that a present gift to an immature child without providing reasonable protection of the corpus of the gift would be of some value, but how much greater this value is if the gift be accompanied by proper safeguards for its protection and effective use. In the one case the child might live like a king while the gift was being consumed. In the other case the well-being of the beneficiary is made doubly sure; first, by making the entire fund available for the child's protection, and second, by providing for the preservation of the trust estate where such preservation is consistent with the controlling purpose of the trust.

The express language of these trust instruments admits of no misunderstanding as to their underlying purpose and intent; and these hopeful expressions were not permitted to stand alone or even to be of equal dignity with the other provisions of the trust instruments, but in the very paragraph by which created were made expressly subordinate to the general purposes of the trust by the concluding sentence which reads as follows:

> "It is expressly provided, however, that our said grandson (granddaughter) shall be properly maintained, educated and supported, and if it be necessary to use all of the income and even all of the corpus of the estate hereby created and all augmentations thereof, it shall be the duty of the trustee to see that this obligation shall be properly and reasonably discharged."

Ultimate dates for final distributions of the corpus were specifically provided, and to the extent that the trust estate should not be earlier distributed, the survivorship of the specifically named grandchild beneficiary until the specified distribution date is a prerequisite to its receiving such distribution. In this sense the survivorship of the beneficiary would be determinative of capacity to share in the particular distribution. But this is merely to say that continuation of life is a preliminary requirement to the future enjoyment of property rights. Certainly one cannot enjoy property after his decease; but this fact constitutes no proper basis for holding that the interest of a fee simple owner of property is a future interest because such owner may die tomorrow. The question is not what use, possession and enjoyment may ultimately be appropriated by the beneficiary, but rather what is the vested and fixed right today; and it is respectfully submitted that immediately the gifts under consideration were made the specifically named beneficiary had a vested and fixed right, uncontrolled by any discretionary power of the trustee to alter, change or ignore; and that this right was a present interest and not a future interest.

In connection with the possible effect of the discretionary powers of the trustee in the instant case a brief reference to one other phase of the trust indentures is proper to be made.

In its opinion in the instant case The Tax Court of the United States suggested that

> "such phrases as 'in the judgment of the trustee,' 'for best interest of said trust estate,' and 'if it be necessary,' which recur frequently in each instrument, adequately vest the trustee with discretionary power and authority."

An examination of the trust instruments shows that these quoted phrases occur only in Article 2 and Article 3.

Article 2 deals with the powers of the trustee in the matter of administering the trust estate, instituting and defending litigation, and more particularly acquiring and disposing of property. Naturally these matters should be handled in such way as "in the judgment of the trustee" would be "for the best interest of the trust estate;" but it goes without saying that The Tax Court did not intend to indicate that these matters were discretionary in the sense that the trustee could do as he pleased, and without any accountability to the beneficiaries for the proper administration of the trust.

In Article Three the words "if it be necessary" occur twice and the words "in the judgment of the trustee" occur once. All of these provisions have been specifically considered earlier in this brief so that further discussion at this point is not felt to be in order.

In concluding this argument brief references to certain phases of the cases of KINNEY V. ANGLIM, 43 Fed. Supp. 431, and SENSENBRENNER V. COMMISSIONER, 134 Fed. (2d) 883, are considered to be in order.

In KINNEY V. ANGLIM (supra), the court was dealing with the case in which the trust was created for the trustor's three granddaughters, with provision for final distributions to the beneficiaries when they should attain the ages of twenty-one and thirty years. The income to the trust was to be paid to the mothers of the several beneficiaries from the inception of the trust until the particular child should reach the age of twenty-one years. The court held that the gifts to each of the three grandchildren were gifts of present interests and the three $5,000 exclusions were held to have been proper.

In SENSENBRENNER V. COMMISSIONER (supra), certain trusts were created for the benefit of seven grandchildren. The trust instruments provided that the income to the trusts during minority of the beneficiary was to be paid either to the donor or to another party designated in the trust instruments, to be used by such distributee for the support, main-

tenance and education of the particular grandchild in such manner as the distributee should in his sole discretion deem best. The corpus of the trusts was to be distributed at a designated future date. The decision was that the gift of income constituted a gift of present interest.

In each of these cases only the income was to be distributed and not the corpus; but even as to income, distribution was not to be made to the minor child but to some other party by whom it might or might not be made available to the child. In the opinion in KINNEY v. ANGLIM no information is given as to the obligation of the mother with reference to income received by her, and it would therefore appear that she might do with this income as she pleased. In SENSENBRENNER v. COMMISSIONER the income was distributable not to the minor beneficiary but either to a designated person or to the donor to be used as such distributee in his sole discretion might deem best.

Surely the rights of the beneficiaries in these two cases were more tenuous and uncertain, and more dependent upon the attitude and discretion of the mother in the one case and the donor or other distributee in the other case, than are the rights of the beneficiaries in the instant case where it is made the express duty of the trustee to see that the named beneficiary be properly maintained, educated and supported.

Conclusion

In the instant case there is no uncertainty as to the identity of the beneficiary and no problem of determining either the number of eventual beneficiaries or the value of respective beneficial interests in the gifts. The gifts are immediate, definite, absolute and irrevocable and in no way dependent upon the happening of any future event either for the determination of the donees or the quantum of the gifts. The specifically named grandchildren beneficiaries are given the

fullest use, possession and enjoyment possible sensibly to confer upon children of such tender years and the trustee can withhold no reasonably necessary or proper support without plainly violating the trust. It is therefore submitted that in view of all the facts and circumstances attendant upon the making of the gifts and of the obligation of the trustee to carry out the underlying purpose of the trust, there is no proper basis in either the law or regulations, or in the reasoning or governmental policy supporting same, for holding that the gifts now under consideration are other than gifts of present interests.

Prayer

Wherefore Petitioners pray that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit affirming the judgment of the Tax Court of the United States be reversed, and that the Supreme Court of the United States render judgment herein decreeing that the several gifts under consideration in this cause are gifts of present interests and not gifts of future interests and that the annual $5,000.00 exclusions are proper to be made by your Petitioners in computing their respective gift taxes for the year 1937, and that the $8,400.00 gift tax deficiency heretofore assessed against each of your Petitioners together with all interest on account thereof be cancelled and annulled, and that your Petitioners be decreed all such other and further relief to which they are justly entitled.

Respectfully submitted,

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W. M. Cleaves,
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Of Counsel

No. 88

In the Supreme Court of the United States

OCTOBER TERM, 1944

ELLA F. FONDREN AND THE ESTATE OF W. W. FONDREN, DECEASED, ELLA F. FONDREN, INDEPENDENT EXECUTRIX, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Tax Court (R. 28–36) is reported at 1 T. C. 1036. The opinion of the Circuit Court of Appeals (R. 71–78) is reported at 141 F. 2d 419.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 3, 1944 (R. 78). The petition for a writ of certiorari was filed May 19, 1944. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In 1937 the taxpayer and her husband, whose estate she represents as executrix, each made gifts worth $5,975 to each of seven trusts which they had previously established in favor of seven minor grandchildren. Each trust instrument provided that the income and corpus were to be distributed in portions as the beneficiary reached the ages of 25, 30, and 35 years, and also that, if necessary, the trustee was to provide for the support, maintenance, and education of the grandchild, using only the income of the trust if that were sufficient. The question is whether the gifts were of future interests within the meaning of Section 504 (b) of the Revenue Act of 1932, so as to negative a $5,000 exclusion from each gift, to which the donors would otherwise be entitled.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 504. NET GIFTS.
>
> (a) *General Definition.*—The term "net gifts" means the total amount of gifts made during the calendar year, less the deductions provided in section 505.
>
> (b) *Gifts Less Than $5,000.*—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts to such person shall not, for the purposes of subsection (a), be included

in the total amount of gifts made during such year.

Treasury Regulations 79 (1936 Ed.):

> ART. 11. *Future interests in property.*—No part of the value of a gift of a future interest may be excluded in determining the total amount of gifts made during the calendar year. "Future interests" is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time. * * *

STATEMENT

The taxpayer, on her own behalf and also as executrix of her husband's estate, petitioned the Tax Court to redetermine deficiencies found by the Commissioner in the gift taxes of the taxpayer and her husband for 1937. The facts were stipulated (R. 42–64), and as stipulated were adopted as the findings of fact of the Tax Court (R. 29). They may be summarized as follows:

During 1935, 1936, and 1937 the taxpayer and her husband executed seven trust instruments, one in favor of each of their seven grandchildren (R. 30). On or about December 2, 1937, the taxpayer and her husband each made a gift to each trust of 100 shares of Humble Oil & Refining Company stock having a fair market value at that time of $59.75 a share (R. 33). On their gift tax returns

for 1937 the taxpayer and her husband each claimed the statutory exclusion of $5,000 for each of his seven gifts, reported a taxable gift to each trust of $975, and paid gift taxes on the basis reported (R. 33). The Commissioner determined that the gifts in trust constituted gifts of future interests in property against which no exclusions are allowable, and he accordingly disallowed the exclusions (R. 34).

None of the grandchildren was over six years of age at the time the trust was created for him. All were living when this proceeding was heard. Each trust instrument made W. W. Fondren trustee. Upon his death in 1939, the taxpayer succeeded to the trusteeship and has since administered each trust as trustee. (R. 30.)

So far as here pertinent, the provisions of the seven trust instruments were the same (R. 30). The trusts were absolute and irrevocable and the grantors neither received nor retained any interest in the estate or the benefits accruing therefrom (R. 33).

The stated purpose in creating each trust was "to provide for the personal comfort, support, maintenance and welfare of" each grandchild. The trusts were to continue until each grandchild attained the age of 35, but 25 percent of the corpus and accumulations, if any, were to be delivered to the grandchild when he or she attained the age of 25, 33⅓ percent when he or she attained age 30, and the remainder when

he or she attained age 35. If the beneficiary died leaving issue before termination of the trust, the trust estate was to be held and administered for the benefit of the issue and delivered share and share alike when the youngest of such issue attained age 21. If the beneficiary died without issue before termination of the trust, successor beneficiaries were provided for by the trust instruments, or the trust estate descended to the heirs under the laws of the State of Texas (R. 32).

Article Three of the trust instrument provided (R. 31-32):

> Out of the trust estate hereby created and as the same may hereafter be augmented and increased by gift from the Grantors, by either of them as herein provided for, or from any other source whatsoever, the Trustee shall provide for the support, maintenance and education of our said Grandson [or Granddaughter as the case may be] using only the income of said estate for that purpose if it be sufficient. If it be necessary to use any of the corpus of the estate for that purpose and in the judgment of the Trustee it is best to do so, said Trustee may make advancements out of the corpus of said trust estate for such purpose for the benefit of our said Grandson.
>
> It is contemplated, however, that our said Grandson will have other adequate and sufficient means of support, and that it will not be necessary to use either the income or the corpus of the trust estate hereby

> created to properly provide for his education, maintenance and support; and, if the income from the trust estate be not needed for these purposes, then all of the income from said trust estate not so needed shall be by the Trustee passed to capital account of said trust estate, and shall be and become a part of said trust estate, it being our hope that all of the earnings and income of said trust estate during the period of this Trust may be used to augment the trust estate and be delivered to our said Grandson at the periods herein provided for. It is expressly provided, however, that our said Grandson shall be properly maintained, educated and supported, and if it be necessary to use all of the income and even all of the corpus of the trust estate hereby created and all augmentations thereof, it shall be the duty of the Trustee to see that this obligation shall be properly and reasonably discharged.
>
> * * * * *

The trust funds were not to be liable for obligations of the beneficiaries. A beneficiary could not anticipate his or her interest in the trust fund created for him and the fund could not be reached by judgment creditors or others having claims against the beneficiary. (R. 32–33.)

At all times subsequent to the creation of the trusts, the parents of the named beneficiaries have adequately and sufficiently provided for the support, maintenance, and education of their chil-

dren. As a result, no part of the trust income or corpus has been distributed or used for the benefit, support, maintenance, or education of any of the beneficiaries of the seven trusts. (R. 34.)

The Tax Court found that the gifts made by the taxpayer and her husband to the trust estates were gifts of future interests (R. 34) and sustained the Commissioner's determinations of deficiency. The Circuit Court of Appeals affirmed the Tax Court's decision (R. 78).

ARGUMENT

Since the decisions in *United States* v. *Pelzer*, 312 U. S. 399, 403–404, and *Ryerson* v. *United States*, 312 U. S. 405, which specifically approved the definition of "future interests" in Treasury Regulations 79, Article 11, *supra*, gifts of property have uniformly been held to be gifts of future interests if their use, possession, or enjoyment is postponed either to a fixed future time or to a future time to be determined in the discretion of a trustee or upon some other contingency. The time of vesting of legal or equitable title is immaterial. *Howe* v. *United States* (C. C. A. 7th), decided April 25, 1944 (1944 P-H, par. 62,533); *Sensenbrenner* v. *Commissioner*, 134 F. 2d 883 (C. C. A. 7th); *Commissioner* v. *Lowden*, 131 F. 2d 127 (C. C. A. 7th); *Commissioner* v. *Gardner*, 127 F. 2d 929 (C. C. A. 7th); *Commissioner* v. *Glos*, 123 F. 2d 548 (C. C. A. 7th); *Fisher* v. *Commissioner*, 132 F. 2d 383 (C. C. A. 9th);

French v. *Commissioner*, 138 F. 2d 254 (C. C. A. 8th); *Commissioner* v. *Wells*, 132 F. 2d 405 (C. C. A. 6th); *Commissioner* v. *Phillips' Estate*, 126 F. 2d 851 (C. C. A. 5th); *Hopkins* v. *Magruder*, 122 F. 2d 693 (C. C. A. 4th); *Commissioner* v. *Taylor*, 122 F. 2d 714 (C. C. A. 3d), certiorari denied, 314 U. S. 699; *Helvering* v. *Blair*, 121 F. 2d 945 (C. C. A. 2d); *Welch* v. *Paine*, 130 F. 2d 990 (C. C. A. 1st); *Commissioner* v. *Brandegee*, 123 F. 2d 58 (C. C. A. 1st); *Welch* v. *Paine*, 120 F. 2d 141 (C. C. A. 1st).

The decision below is not in conflict with the decisions in *Smith* v. *Commissioner*, 131 F. 2d 254 (C. C. A. 8th); *Sensenbrenner* v. *Commissioner*, *supra*; and *Kinney* v. *Anglim*, 43 F. Supp. 431 (N. D. Calif.), as the taxpayer asserts it to be (Br. 6). In the *Sensenbrenner* case the gift of the corpus was held to be that of a future interest, in accordance with the Government's contention. Since the entire income was to be distributed to the beneficiaries quarterly or oftener and the trustee had no discretion to accumulate the income, a present interest in the income was, however, conferred. In *Kinney* v. *Anglim* the gift was held to be of a present interest because the income was to be paid over currently. In the *Smith* case the court found from the trust instrument, the size of the gift, the ages of the beneficiaries and the purpose of the trust that the grantor did not intend an accumulation or retention of principal or income, but affirmatively

intended both principal and income to be paid over currently for the education of the beneficiaries and to prepare them to attain and occupy an advantageous and desirable position in life. The beneficiaries needed the money for these purposes immediately, and this was understood by the grantor when the gifts were made. The trustee had no real discretion to withhold the income or the corpus. The court in the *Smith* case expressly rested its decision upon the peculiar facts and distinguished cases like the present where the real trust purpose is to accumulate income even though the trustee is empowered to pay over some of the income or corpus during the accumulating period if the beneficiaries should fall into need. That the *Smith* and *Sensenbrenner* cases are not inconsistent with the principle generally followed is indicated by the fact that other decisions in the same circuits, in cases in which the trustees had discretion to accumulate income or to distribute it, hold that future interests were involved (*Commissioner* v. *Gardner, supra; French* v. *Commissioner, supra,* expressly distinguishing *Smith* v. *Commissioneer, supra*).

The properties given in trust in the instant case are well within the definition of future interests for gift-tax purposes as it has thus been settled. In Article Three the grantors stated their expectation that the grandchildren would have other and adequate means of support, and expressed the hope that all of the earnings and income of the

trust estates might be retained and accumulated for delivery intact when the donees reached the specified ages. The trustees are directed to pay over the income or corpus for the grandchildren's support, maintenance, and education only if that should be necessary. Article Three expressly contemplates that this contingency, if it should occur at all, will happen only at a future time. That the trustees may under some circumstances fall under a duty to apply trust income or corpus to education and support does not alter the contingent and future nature of the beneficiaries' interest for gift-tax purposes. *French* v. *Commissioner, supra.* Especially is this the case where, as here, the beneficiaries are of tender age at the time of the gifts.

CONCLUSION

There is no conflict of decisions. The instant case turns upon its own facts and was correctly decided below. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

No. 88

In the Supreme Court of the United States

OCTOBER TERM, 1944

ELLA F. FONDREN AND THE ESTATE OF W. W. FONDREN, DECEASED, ELLA F. FONDREN, INDEPENDENT EXECUTRIX, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Tax Court (R. 28–36) is reported at 1 T. C. 1036. The opinion of the Circuit Court of Appeals (R. 71–78) is reported at 141 F. 2d 419.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 3, 1944. (R. 78.) The petition for a writ of certiorari was filed May 19, 1944, and was granted on October 9, 1944. The jurisdiction of this Court is invoked under Sec-

tion 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In 1937 the taxpayer and her husband made gifts to each of seven trusts which they had previously established in favor of seven minor grandchildren. Each trust instrument provided that the corpus and accumulated income were to be distributed in portions as the beneficiary reached the ages 25, 30, and 35 years, and also that, if necessary, the trustee was to provide for the support, maintenance, and education of the beneficiary, using only the income of the trust if that were sufficient. The question is whether the gifts were of future interests within the meaning of Section 504 (b) of the Revenue Act of 1932, so that the $5,000 exclusion otherwise allowable with respect to each gift must be denied.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 504. NET GIFTS.
>
> (a) *General Definition.*—The term "net gifts" means the total amount of gifts made during the calendar year, less the deductions provided in section 505.
>
> (b) *Gifts Less Than $5,000.*—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts to such person shall not, for the

purposes of subsection (a), be included in the total amount of gifts made during such year.

Treasury Regulations 79 (1936 Ed.):

> ART. 11. *Future interests in property.*—No part of the value of a gift of a future interest may be excluded in determining the total amount of gifts made during the calendar year. "Future interests" is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time. * * *

STATEMENT

The taxpayer, on her own behalf and also as executrix of her husband's estate, petitioned the Tax Court to redetermine deficiencies found by the Commissioner in the gift taxes of the taxpayer and her husband for 1937. The facts were stipulated (R. 42-64), and as stipulated were adopted as the findings of fact of the Tax Court (R. 29). They may be summarized as follows:

During 1935, 1936, and 1937 the taxpayer and her husband executed seven trust instruments, one in favor of each of their seven grandchildren. (R. 30.) On or about December 2, 1937, the taxpayer and her husband each made a gift to each trust of 100 shares of Humble Oil & Refining

Company stock having a fair market value at that time of $59.75 a share. (R. 33.) On their gift tax returns for 1937 the taxpayer and her husband each claimed the statutory exclusion of $5,000 for each of his seven gifts, reported a taxable gift to each trust of $975, and paid gift taxes on the basis reported. (R. 33.) The Commissioner determined that the gifts in trust constituted gifts of future interests in property against which no exclusions are allowable, and he accordingly disallowed the exclusions. (R. 34.)

The Tax Court found that the gifts made by the taxpayer and her husband to the trust estates were gifts of future interests (R. 34) and sustained the Commissioner's determinations of deficiency. The Circuit Court of Appeals affirmed the Tax Court's decision (R. 78).

None of the grandchildren was over six years of age at the time the trust was created for him. All were living when this proceeding was heard. Each trust instrument made W. W. Fondren trustee. Upon his death in 1939, the taxpayer succeeded to the trusteeship and has since administered each trust as trustee. (R. 30.)

So far as here pertinent, the provisions of the seven trust instruments are the same. (R. 30.) The trusts are absolute and irrevocable and the grantors neither received nor retained any interest in the estate or the benefits accruing therefrom. (R. 33, 58.)

The stated purpose in creating each trust is "to provide for the personal comfort, support, maintenance and welfare of" each grandchild. (R. 57.) The trust is to continue until the beneficiary attains the age of 35, but 25% of the corpus and accumulations, if any, are to be delivered to the grandchild when he or she attains the age of 25, 33⅓% when he or she attains the age of 30, and the remainder when he or she attains the age of 35. (R. 55.) If the beneficiary dies leaving issue before termination of the trust, the trust estate is to be held and administered for the benefit of the issue and delivered share and share alike when the youngest of such issue attains the age of 21. If the beneficiary dies without issue before termination of the trust, successor beneficiaries are provided for by the trust instrument, or the trust estate descends to the heirs of the successor beneficiaries under the laws of the State of Texas. (R. 32, 56.)

Article Three of the trust instrument provides (R. 31–32, 54–55):

> Out of the trust estate hereby created and as the same may hereafter be augmented and increased by gifts from the Grantors, by either of them as herein provided for, or from any other source whatsoever, the Trustee shall provide for the support, maintenance and education of our said Grandson, [or Granddaughter as the case may be] using only the income of said es-

tate for that purpose if it be sufficient. If it be necessary to use any of the corpus of the estate for that purpose and in the judgment of the Trustee it is best to do so, said Trustee may make advancements out of the corpus of said trust estate for such purpose for the benefit of our said Grandson.

It is contemplated, however, that our said Grandson will have other adequate and sufficient means of support, and that it will not be necessary to use either the income or the corpus of the trust estate hereby created to properly provide for his education, maintenance and support; and, if the income from the trust estate be not needed for these purposes, then all of the income from said trust estate not so needed shall be by the Trustee passed to capital account of said trust estate, and shall be and become a part of said trust estate, it being our hope that all of the earnings and income of said trust estate during the period of this Trust may be used to augment the trust estate and be delivered to our said Grandson at the periods herein provided for. It is expressly provided, however, that our said Grandson shall be properly maintained, educated and supported, and if it be necessary to use all of the income and even all of the corpus of the trust estate hereby created and all augmentations thereof, it shall be the duty of the Trustee to see that this obligation shall be properly and reasonably discharged.

* * * * *

The trust funds are not to be liable for obligations of the beneficiaries. A beneficiary may not anticipate his or her interest in the trust fund created for him and the fund may not be reached by judgment creditors or others having claims against the beneficiary. (R. 32–33, 57–58.)

At all times subsequent to the creation of the trusts, the parents of the named beneficiaries have adequately and sufficiently provided for the support, maintenance, and education of their children. As a result, no part of the trust income or corpus has been distributed or used for the benefit, support, maintenance, or education of any of the beneficiaries of the seven trusts. (R. 34.)

SUMMARY OF ARGUMENT

Prior to a recent decision of the Circuit Court of Appeals for the Third Circuit, overruling its own earlier decision, the rule had become well settled that a gift in trust to accumulate income and to pay the corpus and accumulations to the beneficiary at a future time is a gift of a future interest, as to both income and corpus, even though the accumulation is to continue only during the disability of the beneficiary and even though the trustee may be authorized to pay the income or corpus to the beneficiary if in his judgment it should become necessary to do so for the beneficiary's maintenance, education or support. The rule has apparent confirmation in Con-

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gressional re-enactment of the provisions permitting exclusions with respect to gifts in trust, after the rule had been uniformly applied in a number of Circuit Court of Appeals' decisions. The rule, moreover, is a correct application of decisions of this Court, which establish that the interest taken by the beneficiary rather than the interest parted with by the donor is controlling. Under those decisions the question turns solely on whether the beneficiary takes a present right to the use, possession or enjoyment of the thing given. Unless the donee can require payment from the trustee presently, it is not material that the donee may have present rights of a character which a court of law or equity will recognize, nor do present expectancies of future payment constitute such "enjoyment" as to render a gift a present one. Under the trusts in the present case it was expressly contemplated that the beneficiaries would have other and adequate means of support, and the trustee was not to pay over corpus or income to the beneficiaries except in the uncertain contingencies that the beneficiaries would need money for the designated purposes which would not be forthcoming from their parents who had the primary duty of support. The contention that under the Commissioner's theory no gift to minors could be made, other than one of a future interest, is without substance. Gifts to minor beneficiaries are placed

on an equality with gifts to adults by applying to both the principle that a right to receive the gift only upon the exercise of discretion is a gift of a future interest.

ARGUMENT

THE INTERESTS GIVEN IN THE PRESENT CASE WERE FUTURE INTERESTS

Until recently the term "future interests" as it relates to the present type of case had been uniformly applied and had a settled meaning indicated by the decisions of this Court in *Ryerson* v. *United States*, 312 U. S. 405, and *United States* v. *Pelzer*, 312 U. S. 399. The only Circuit Court of Appeals decision which departs from the uniform application of the rule is that in *Disston* v. *Commissioner*, 144 F. 2d 115 (C. C. A. 3d), Judge Biggs dissenting, which overruled the same court's prior decision in *Commissioner* v. *Taylor*, 122 F. 2d 714, 715, certiorari denied, 314 U. S. 699. The *Disston* case is pending in this Court upon petition for a writ of certiorari filed on behalf of the Commissioner on October 12, 1944, No. 589.

Except for the decision in the *Disston* case the Circuit Courts of Appeals have uniformly held that a gift in trust to accumulate income and pay the corpus and accumulations to the beneficiary at a future time is a gift of a future interest, as to both income and corpus, notwithstanding that the trustee may have discretion to

pay the income or corpus to the beneficiary if it should become necessary to do so for his maintenance, education or support or upon some similar contingency. The same rule has been applied whether the donees were minors or adults. *Welch* v. *Paine*, 120 F. 2d 141 (C. C. A. 1st); *Commissioner* v. *Taylor*, 122 F. 2d, 714, 715 (C. C. A. 3d), certiorari denied, 314 U. S. 699; *Commissioner* v. *Brandegee*, 123 F. 2d 58 (C. C. A. 1st); *Commissioner* v. *Phillips' Estate*, 126 F. 2d 851 (C. C. A. 5th); *Commissioner* v. *Gardner*, 127 F. 2d 929 (C. C. A. 7th); *Welch* v. *Paine*, 130 F. 2d 990 (C. C. A. 1st); *Commissioner* v. *Wells*, 132 F. 2d 405 (C. C. A. 6th); *French* v. *Commissioner*, 138 F. 2d 254 (C. C. A. 8th); *Roberts* v. *Commissioner*, 143 F. 2d 657 (C. C. A. 5th), petition for certiorari filed by the taxpayer October 6, 1944;[1] *Howe* v. *United States*, 142 F. 2d 310 (C. C. A. 7th), petition for certiorari filed by the taxpayer September 6, 1944; *Hutchings-Sealy Nat. Bank* v. *Commissioner*, 141 F. 2d 422 (C. C. A. 5th); *Helvering* v. *Blair*, 121 F. 2d 945 (C. C. A. 2d). The Tax Court has applied the same rule in cases like the present case in six decisions in the past year alone.[2]

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[1] The discretionary aspect of the duties of the trustee in the *Roberts* case appears more fully in the opinion of the Tax Court, 2 T. C. 679, 687.

[2] *Allen* v. *Commissioner*, 3 T. C. 844 (decided after *Disston* v. *Commissioner*, *supra*, and disagreeing with the conclusion there reached); *Scherer* v. *Commissoner*, 3 T. C. 776, 791; *Nicholson* v. *Commissioner*, 3 T. C. 596, 601; *Stoll* v. *Commis-*

Moreover, the rule has apparent confirmation by Congress. In Section 505 of the Revenue Act of 1938, c. 289, 52 Stat. 447, Congress amended Section 504 (b) of the 1932 Act, *supra*, to withdraw the $5,000 exclusion entirely from gifts in trust. This action was occasioned by the fact that the Board of Tax Appeals and several of the Federal courts had decided, prior to this Court's contrary decision in *Helvering* v. *Hutchings*, 312 U. S. 393, that the trust entities were the donees, a result which involved serious possibilities of tax avoidance.[7] The exclusion, reduced to $3,000, was restored to gifts in trust in the Revenue Act of 1942, c. 619, 56 Stat. 798, Section 454, for the reason that the decision in *Helvering* v. *Hutchings*, *supra*, removed the pos-

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sioner, decided August 7, 1944 (1943–1944 P-H Tax Court Memorandum Decisions Service, par. 44,261); *Richardson* v. *Commissioner*, decided November 30, 1943 (id., par. 43,496); *Weathers* v. *Commissioner*, decided September 21, 1943 (id., par. 43,428).

[7] The Senate Finance Committee, with which the amendment originated, stated (S. Rep. No. 1567, 75th Cong., 3d Sess., p. 41 (1939–1 Cum. Bull. (Part 2) 779)):

"The committee is also proposing an amendment by which the exclusion would not apply to gifts in trust. The Board of Tax Appeals and several of the Federal courts have held, with respect to gifts in trust, that the trust entities were the donees and on that account the gifts were of present and not of future interests. The statute, as thus construed, affords ready means of tax avoidance, since a donor may create any number of trusts in the same year in favor of the same beneficiary with a $5,000 exclusion applying to each trust, whereas the gifts, if made otherwise than in trust, would in no case be subject to more than a single exclusion of $5,000."

sibility of gift tax avoidance of which Congress had been apprehensive.[4] The Revenue Act of 1942 was approved on October 21, 1942, after Circuit Courts of Appeals had uniformly decided in *Welch* v. *Paine*, 120 F. 2d 141, and the *Taylor, Brandegee Phillips'* and *Gardner* cases, *supra*, that a trustee's discretionary power to distribute income does not render the gift of the income a present interest. This also had been the conclusion of the Board of Tax Appeals, for example in *Winterbotham* v. *Commissioner*, 46 B. T. A. 972. In relation to a subject with respect to which judicial decisions had caused so much concern, it must be supposed that Congress was aware of the decisions and confirmed their result. *United States* v. *Ryan*, 284 U. S. 167; cf. *White* v. *Winchester Club*, 315 U. S. 32, 40.

The decisions in *Smith* v. *Commissioner*, 131 F. 2d 254 (C. C. A. 8th); *Sensenbrenner* v. *Commissioner*, 134 F. 2d 883 (C. C. A. 7th); and *Kinney* v. *Anglim*, 43 F. Supp. 431 (N. D. Cal.), appeal dismissed on stipulation, 127 F. 2d 291 (C. C. A. 9th) (Pet. Br. 23–24, 36–37), are not departures

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[4] S. Rep. No. 1631, 77th Cong., 2d Sess., p. 243:
"Since the Supreme Court has decided, in *Helvering* v. *Hutchings* (312 U. S. 365 (1941)), that the beneficiaries of the trust rather than the trustee or the trust are the donees of a gift in trust, it is no longer necessary to discriminate against gifts in trust by disallowing the exclusion in such cases (except in cases of gifts of future interests in property) to prevent gift tax avoidance through the device of multiple trusts for the same beneficiary."

from the general rule stated above. In the *Kinney* and *Sensenbrenner* cases the income was to be paid over currently or quarterly without any discretion in the trustee to withhold. For that reason the *Kinney* case held the gift to be of a present interest. In the *Sensenbrenner* case the Government conceded the gift to be of a present interest with respect to the income because the income was to be disbursed currently for the beneficiaries, and the court held the gift to be of a future interest with respect to the corpus, as the Government contended. In the *Smith* case the decision rested upon the holding that the beneficiaries were entitled to the immediate use and enjoyment of the trust income.[5] This is evident from the same court's later decision in *French* v. *Commissioner, supra,* holding that a future interest was involved where the trustee had discretion to accumulate or distribute the income. In the latter case the court stated, at page 258, that there was no such provision for the trustee's discretion in the *Smith* case.

We believe that the decision in *Disston* v. *Commissioner,* 144 F. 2d 115 (C. C. A. 3d), is based

[5] This view was based upon the court's conception of the dominant purpose of the settlor and is of questionable validity. The case has been criticized as resting "on an insecure foundation." *Fisher* v. *Commissioner*, 132 F. 2d 383, 386 (C. C. A. 9th). However, notwithstanding doubt concerning the validity of the court's premise, the conclusion was based upon the application of the legal principle for which we contend.

upon a misapprehension of the term "future interests" and the background of its use in Section 504 (b) of the Revenue Act of 1932.

Section 501 of the Act imposes a tax upon gifts, the amount of which is determined under Section 502 by computing the tax on the sum of the net gifts made by the donor in the calendar year and preceding years, and deducting from that tax a tax computed upon the sum of the net gifts made in the preceding years. The donor is given a specific exemption of $50,000 under Section 505 (a) (1), which he may allocate against his gifts from year to year as he sees fit until the exemption is exhausted. In computing his "net gifts" for any calendar year the donor deducts so much of the specific exemption as he claims for that year, together with the amount of gifts to charity and for other purposes permitted in Section 505 (a) (2). He is also entitled, under Section 504 (b), to the exclusion here in issue of the first $5,000 of the gift made to any donee during the calendar year, other than one of future interests in property.

The purpose of the exclusion is simply to avoid the burden of recording and reporting numerous small gifts, which would be disproportionate to the amount of revenues produced. The amount of the exclusion is made sufficiently large to cover most cases of wedding and Christmas gifts and also occasional gifts of relatively small amounts.

H. Rep. No. 708, 72d Cong., 1st Sess., p. 29 (1939–1 Cum. Bull. (Part 2) 457). The amount of the exclusion was reduced to $4,000 in the Revenue Act of 1938, c. 289, 52 Stat. 447, Section 505, before its reduction to $3,000 in the Revenue Act of 1942, Section 454, *supra*. The report of the House Committee relating to the latter Act indicates that the exclusion would be abolished completely except for the administrative difficulties which would arise if that were done.[6] In short, the legislative purpose in permitting the exclusion suggests no reason for abandoning with respect to it the ordinary canon that tax exemptions are not to be extended by construction. *Helvering* v. *Northwest Steel Mills*, 311 U. S. 46, 49; *Helvering* v. *American Dental Co.*, 318 U. S. 322, 329–330.

It should be observed that while the apprehended difficulty of valuing future interests as to each donee and determining the number of eventual donees suggested the need for different treatment of future interests, the class thus treated is not limited to instances in which this difficulty arises. Congress realized that the difficulty would

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[6] H. Rep. No. 2333, 77th Cong., 2d Sess., p. 37:

"Since this is an annual exclusion (not exhaustible as is the specific exemption) and is not limited to any number of donees, it is possible to distribute property of large aggregate value over a period of years, free not only of gift tax but of estate tax as well. While administrative difficulties prevent the abolition of the exclusion, your committee recommend that it be reduced to $3,000."

not be presented in all the cases which were covered by the rule enacted, for the committee reports use the qualifying phrase "in many instances" (H. Rep. No. 708, *supra*). The statutory exception is in general language and thus includes all gifts of "future interests in property." *Fisher* v. *Commissioner*, 132 F. 2d 383 (C. C. A. 9th); *Commissioner* v. *Glos*, 123 F. 2d 548 (C. C. A. 7th); *Welch* v. *Paine*, 120 F. 2d 141 (C. C. A. 1st). Accordingly, the opinion in the *Disston* case, insofar as it rests upon the fact that the identity of the donees and the value of the gifts were not affected by the trustee's discretionary power in that case, rests upon an erroneous ground.[7] Nor is there anything in the term "future interests" or in the purposes of the exclusion to suggest that interests conferred upon minor beneficiaries are "future" for that reason or are different from the same interests when conferred upon others. This is recognized by the Third Circuit in *Wisotzkey* v. *Commis-*

[7] In point of fact, there is no method of evaluating any suppositious present rights of the beneficiaries in the present type of case. As stated by Judge Biggs, dissenting, in *Disston* v. *Commissioner*, *supra*, p. 120:

"* * * the trustees are the judges (in the first instance) of how much of the income from the gift [and here, how much of the corpus] is to be expended for the immediate benefit of the minors. That amount might be much or little as justified by the circumstances of the particular minor involved and it is impossible to determine the value of the present right or even to allocate it to the first $5,000 in value of the gift. See *Helvering* v. *Blair*, 2 Cir., 121 F. 2d 945, 947."

sioner, decided August 10, 1944 (1944 P-H, par. 62,695), after the *Disston* case, in which a trust involving a mandatory accumulation of income throughout the beneficiary's minority was held to be a gift of a future interest.

The majority opinion in the *Disston* case calls attention to the exclusive nature of the donees' interest under the trusts there involved. The dissenting opinions of Judge Waller in the instant case and in *Hutchings-Sealy Nat. Bank* v. *Commissioner,* 141 F. 2d 422 (C. C. A. 5th), stress the conclusion that the gifts were absolute since both the income and the corpus were irrevocably dedicated to the named donees.[8] This factor alone is not controlling, however. *Hutchings-Sealy Nat. Bank* v. *Commissioner, supra.* It was held not to be controlling in the *Wisotzkey* case, where, in the event of the death of a beneficiary, his trust was to be administered for the benefit of his heirs or assigns. The decision in *Helvering* v. *Hutchings, supra,* holding that the beneficiaries, rather than the trust, are the donees of a gift in trust, necessarily implies that the character of the gift as "present" or "future" must be determined as of the time when the beneficiaries, rather than the trust, come into possession of the gift. The fact

[8] The present case is different upon its facts from the *Disston* case in that here the rights of the named donees, in the event of their death, might pass to successor beneficiaries (R. 32, 56) rather than to the heirs or representatives of the named donees.

that the gift is irrevocable has no significance. Under this Court's decisions in the *Ryerson* and *Pelzer* cases, *supra*, an interest plainly is not a present interest for tax purposes merely because the donee has vested rights which will be recognized by a court of law or equity, for there is the further requirement that he have a right to present use, possession, or enjoyment. *Commissioner* v. *Brandegee*, 123 F. 2d 58 (C. C. A. 1st); *Welch* v. *Paine*, 130 F. 2d 990 (C. C. A. 1st). Furthermore, the *Ryerson* and *Pelzer* cases make it clear that the economic satisfaction which the donee may derive from knowing that he will receive valuable property in the future is not the kind of present "enjoyment" which would make the gift one of a "present" interest.

As both of the courts below have held (R. 35–36, 73–74), there is no merit in the taxpayer's position that the trustee here had no discretion (Br. 32–37). It is particularly evident from Article 3 of the trusts (R. 54–55) that neither the income nor the corpus was likely to be received by the beneficiaries immediately. Their use, possession, or enjoyment could not begin until the happening of future contingencies—the beneficiaries must come to need money for their education, maintenance and support, and the other means of support which the grantors expressly contemplated must fail. Nor is there validity to the contention that the trustee here is in the same position as a guardian under state law.

The trustee was empowered to withhold payments during the minority of a beneficiary under circumstances, falling short of need, which might call upon a guardian to purchase advantages for his ward through the expenditure of income or principal belonging to the ward. Moreover, regardless of the extent of the trustee's discretion, the future and contingent nature of the interest of the beneficiaries is evident from the fact that whereas a child's estate or his parent is primarily charged with the burden of his support, distribution of the trust estate could not be compelled unless these primary sources failed. *Welch* v. *Paine*, 130 F. 2d 990, 992 (C. C. A. 1st); *Estate of Smith*, 23 Cal. App. 2d 383.

It is not true, as suggested in the dissenting opinion in the court below, that under the Commissioner's theory there would be no other way to make a gift to a minor than through the creation of a future interest. Even if this were true, there would still be no valid reason for treating a future interest as a present interest. But the proposition is unsound. A gift of a present interest is possible even by means of a trust. See *Fisher* v. *Commissioner*, 132 F. (2d) 383 (C. C. A. 9th), and *Kinney* v. *Anglim*, 43 F. Supp. 431 (N. D. Cal.), appeal dismissed on stipulation, 127 F. 2d 291 (C. C. A. 9th), in which the trustees were to pay the income to the parents of the minor beneficiaries and the gifts of income were treated as present gifts.

Gifts to minor beneficiaries are placed on an equality with gifts to adults by applying to both the principle that a right to receive the gift only upon the exercise of a trustee's discretion is a gift of a future interest.

CONCLUSION

We submit that the decision below correctly follows the established rule and that the judgment should be affirmed.

Respectfully submitted.

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DECEMBER 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

SUPREME COURT OF THE UNITED STATES.

No. 88.—October Term, 1944.

Ella F. Fondren, and the Estate of W. W. Fondren, Deceased, et al., Petitioners,
vs.
Commissioner of Internal Revenue.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 29, 1945.]

Mr. Justice Rutledge delivered the opinion of the Court.

In 1935, 1936 and 1937 petitioner, Ella F. Fondren, and her husband, since deceased, created seven separate irrevocable trusts, each in favor of a grandchild of tender years, and each of them made gifts to each trust of corporate stock having the fair market value of $5,975. The donors made gift tax returns for 1937, claiming the statutory exclusion of $5,000 for each gift, and accordingly reported taxable gifts for each trust of $975. Gift taxes were paid on this basis.

The Commissioner made deficiency assessments, disallowing the exclusions on the ground that the gifts were of "future interests in property" within the meaning of the Revenue Act of 1932, c. 209, 47 Stat. 169, and Treasury Regulations 79 (1936 ed.)[1] The Tax Court upheld the Commissioner, the cases being consolidated for hearing and decision. 1 T. C. 1036. The Circuit Court of Appeals affirmed the Tax Court's decision, one judge dissenting. 141 F. 2d 419. Certiorari was granted, 323 U. S. —, because of the importance of the question as affecting the taxability of gifts made for the benefit of minor children and because of alleged or apparent conflict with decisions of other courts.[2]

[1] The statute is as follows:

"Sec. 504. Net Gifts.

"(a) *General Definition.*—The term 'net gifts' means the total amount of gifts made during the calendar year, less the deductions provided in section 505.

"(b) *Gifts Less Than $5,000.*—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year."

The pertinent part of the Regulation is quoted in the text below.

[2] The petition alleged conflict with Smith v. Commissioner, 131 F. 2d 254 (C. C. A. 8th); Sensenbrenner v. Commissioner, 134 F. 2d 883 (C. C. A. 7th); and Kinney v. Anglim, 43 F. Supp. 431 (N. D. Calif.). Cf. also

The sole issue is whether the gifts were of "future interests" within the meaning of the statute and the regulation. The latter provides:

> Art. 11. . . . "Future interests" is a legal term, and includes reversions, remainders, and *other interests or estates*, whether vested or contingent, and whether or not supported by a particular interest or estate, *which are limited to commence in use, possession, or enjoyment at some future date or time.* . . . [Emphasis added]

Upon the facts the issue turns on whether the interests acquired by the minor beneficiaries were "limited to commence in use, possession, or enjoyment at some future date or time." *Rgerson* v. *United States*, 312 U. S. 405; *United States* v. *Pelzer*, 312 U. S. 399.

Under these decisions it is not enough to bring the exclusion into force that the donee has vested rights. In addition he must have the right presently to use, possess or enjoy the property. These terms are not words of art, like "fee" in the law of seizin, *United States* v. *Pelzer*, *supra* at 403, but connote the right to substantial present economic benefit. The question is of time, not when title vests, but when enjoyment begins. Whatever puts the barrier of a substantial period between the will of the beneficiary or donee now to enjoy what has been given him and that enjoyment makes the gift one of a future interest within the meaning of the regulation.

Accordingly, it has been held that if the income of a trust is required to be distributed periodically, as annually, but distribution of the corpus is deferred, the gift of the income is one of a present interest, that of the corpus one *in futuro*. *Fisher* v. *Commissioner*, 132 F. 2d 383; *Sensenbrenner* v. *Commissioner*, 134 F. 2d 883. *A fortiori*, if income is to be accumulated and paid over with the corpus at a later time, the entire gift is of a future interest,[3] although upon specified contingency some portion or all of the fund may be paid over earlier.[4] The contingency may be the exercise of the trustee's discretion, either absolute or con-

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Disston v. Commissioner, 144 F. 2d 115 (C. C. A. 3d). The decision, one judge dissenting, overruled the prior decision in Commissioner v. Taylor, 122 F. 2d 714, cert. denied, 314 U. S. 699. A petition for writ of certiorari was filed in the Disston case on October 12, 1944, and now is pending.

[3] Welch v. Paine, 120 F. 2d 141; Commissioner v. Taylor, 122 F. 2d 714, 715, cert. denied, 314 U. S. 699; Commissioner v. Brandegee, 123 F. 2d 58; Commissioner v. Phillips' Estate, 126 F. 2d 851; Commissioner v. Gardner, 127 F. 2d 929; Welch v. Paine, 130 F. 2d 990; Commissioner v. Wells 132 F. 2d 405; French v. Commissioner, 138 F. 2d 254; Roberts v. Commissioner, 143 F. 2d 657; Howe v. United States, 142 F. 2d 310; Hutchings-Sealy Nat. Bank v. Commissioner, 141 F. 2d 422; Helvering v. Blair, 121 F. 2d 945.

[4] *Ibid.*

tingent.[5] It may also be the need of the beneficiary, not existing when the trust or gift takes effect legally, but arising later upon anticipated though unexpected conditions, either to create a duty in the trustee to pay over or to permit him to do so in his discretion.[6]

In the light of these principles and decisions, it is necessary to consider the terms of the trusts and the circumstances in which the gifts were made. The trust instruments were substantially uniform except for variations in the names of the beneficiaries and, in case of death, their successors in interest. The trusts were irrevocable, the donors retaining no beneficial interest in the estates. Each instrument named the donor, W. W. Fondren, as trustee, and Ella F. Fondren, the other donor, as successor trustee. They reserved the rights as donors to remove any trustee, except Mr. Fondren, and to name successor trustees. Subject to these reservations and the directions set forth below, the trustee was given substantially complete control.

The trusts' stated purpose was "to provide for the personal comfort, support, maintenance, and welfare" of the grandchildren. But from the explicit recitals of the instruments,[7] as well as the evidence, including a stipulation, it is clear that the parents of each child were so situated that, when the gifts were made, they were fully able to provide for and educate him. And, from the same recitals, it is clear there was little reason to believe that any parent would not continue so until the child's majority. Accordingly, in each instance, the trust was to continue until the child should attain the age of thirty-five. Hence also the income was to be accumulated, except upon the contingencies specified below, and each beneficiary was to receive 25 per cent of the corpus and accumulations at age twenty-five, 33 1/3 per cent at age thirty, and the remainder at age thirty-five.

Aware of the uncertainties of our world, however, the donors directed in Article 3:

> . . . [T]he Trustee shall provide for the support, maintenance and education of our said Grandson, using only the income of said estate for the purpose if it be sufficient. If it be necessary to use any of the corpus of the estate for that purpose *and in the judgment of the Trustee it is best to do so*, said Trustee *may make ad-*

[5] Welch v. Paine, 120 F. 2d 141; Commissioner v. Taylor, 122 F. 2d 714, 715, cert. denied, 314 U. S. 699; Commissioner v. Brandegee, 123 F. 2d 58; Commissioner v. Phillips' Estate, 126 F. 2d 851; Commissioner v. Gardner, 127 F. 2d 929; Winterbotham v. Commissioner, 46 B. T. A. 972; cf. Ryerson v. United States, 312 U. S. 405, 408.

[6] Cf. authorities cited note 3 *supra*.

[7] Cf. the recitals quoted in the text below.

vancements out of the corpus of said trust estate for such purpose for the benefit of our said Grandson.

It is contemplated, however, that our said Grandson will have other adequate and sufficient means of support, and that it will not be necessary to use either the income or the corpus of the trust estate hereby created to properly provide for his education, maintenance and support; and, if the income from the trust estate be not needed for these purposes, then all of the income from said trust estate not so needed shall be by the Trustee passed to capital account of said trust estate, and shall be and become a part of said trust estate, it being our hope that all of the earnings and income of said trust estate during the period of this trust may be used to augment the trust estate and be delivered to our said Grandson at the periods herein provided for. *It is expressly provided, however, that our said Grandson shall be properly maintained*, educated and supported, and *if it be necessary to use all of the income and even all of the corpus* of the trust estate hereby created and all augmentations thereof, *it shall be the duty of the Trustee to see that this obligation shall be properly and reasonably discharged*. . . . [Emphasis added]

In view of the apparently conflicting terms of this article for use of the corpus, the exact scope of the trustee's discretion is by no means clear. But this need not be determined. Whether the disposition is in his judgment entirely, as the first clause indicates, or under the second is so only with reference to how much of the fund may be needed,[8] the trustee cannot act in any case to apply corpus or income for the support, maintenance and education of the beneficiary until necessity arises.

Under the particular facts, this requirement is important in two respects. It is, as petitioners urge, a limitation upon the trustee's discretion. His power is not unconfined. Even though the existence and amount of need may be in the first instance for his determination, it does not follow that, need existing, the trustee arbitrarily could refuse to make the application. The case therefore is not one in which present enjoyment is dependent upon an exercise of the trustee's absolute discretion.

[8] Petitioner presents the case as if no discretion whatever were vested in the trustee as to making the payments over. However, in the first provision for use of the corpus such use is authorized "if it be necessary . . . and in the judgment of the Trustee it is best to do so"; in the other provision the duty imposed, "if it be necessary to use all of the income and even all of the corpus," is one "to see that this obligation shall be properly and reasonably discharged." If the first clause limits the second, the trustee's discretion is bounded only by what he thinks "it is best to do," and in any event under the latter his duty is only to see that the obligation is "properly and reasonably" discharged. Presumably also the trustee would have some room for judgment on whether particular circumstances would amount to necessity and particular measures would be required to meet it.

But this does not show, as petitioners seem to think, that the minor beneficiaries had, at the moment of the gift, a present right of enjoyment. It rather shows the contrary—that their right was not absolute and immediate, but was conditioned, during minority and afterward until the times specified for distribution, upon a contingency which might never arise. That contingency, by the explicit terms of the trust, was the existence of need which was then nonexistent and, in the stated contemplation of the donors, was not likely to occur in the future, at any rate during the child's minority. The circumstances surrounding the donors and the donees confirm these recitals. The case is one therefore in which the gift, if presently vested, made enjoyment contingent upon the occurrence of future events, not only uncertain, but by the recitals of the instrument itself improbable of occurrence. The gifts consequently were of "future interests in property" within the meaning of Section 504(b).

Petitioners' contrary argument, apart from the misconception that legal vesting of the interest without more satisfies the statute,[9] rests chiefly upon considerations arising from the legislative history and from the fact that gifts for the benefit of children under legal disability to manage their own property must make provision for its control by trustees or otherwise.

Special stress is placed on the fact that each gift was made to or for the benefit of a specifically named beneficiary then in esse and for a definite amount. As the *Pelzer* opinion noted, 312 U. S. at 403, the committee reports recommending the legislation stated: "The exemption being available only in so far as the donees are ascertainable, the denial of the exemption in the case of gifts of future interests is dictated by the apprehended difficulty, *in many instances*, of determining the number of eventual donees and the values of their respective gifts."[10] (Emphasis added.) And in the *Pelzer* case the Court found that the gift involved these difficulties, as well as postponement of enjoyment to the happening of a future uncertain event, since the right of enjoyment was contingent in any event upon the beneficiaries' surviving the ten year period specified for accumulation of income. 312 U. S. at 404.

[9] Several of petitioners' statements of their contentions ignore the contingency upon which enjoyment is deferred in this case, namely the occurrence at some future time of the need or necessity of the beneficiary which would bring the trustee's power or duty to provide for support or maintenance from the trust fund into play. It is not necessary to note these contentions specifically further than to say, in addition to what has been said already, that they assume as the answer to it the very issue in the case.

[10] H. Rep. No. 708, 72d Cong., 1st Sess., 29; S. Rep. No. 665, 72d Cong., 1st Sess., 41.

Both conclusions would seem applicable in this case, the chief difference being that the period of postponement, which the beneficiaries must survive before enjoyment begins, is indefinite rather than for a specified time. That is true in any case where the length of the period is governed by a contingency. But the regulation, adopted almost in the language of the committee reports,[11] does not limit the denial of the exemption to instances where the deferment of enjoyment is at all events for a period which is definite and certain. Cf. *Commissioner* v. *Glos*, 123 F. 2d 548, 550. Clearly the statute is not to be applied differently, to grant or deny the exemption, if there is postponement, merely because in one case the period is under any eventuality for a certain, specified length of time, whereas in another it is of uncertain or indefinite length. The important thing is the certainty of postponement, not certainty of the length of its duration.

Furthermore, if there is postponement, the exemption is denied whether or not the administrative difficulties anticipated in the committee reports inhere in the particular gift. *Commissioner* v. *Glos*, *supra*; *Welch* v. *Paine*, 120 F. 2d 141. Those reports specifically state these difficulties are present "in many instances." But they also state that "the term 'future interests in property' refers to *any* interest or estate, whether vested or contingent, limited to commence in possession or enjoyment at a future date."[12] They thus contemplate, as does the regulation framed in similar terms, vested as well as contingent interests and estates. And there is nothing to indicate that gifts to specified donees in esse and in definite amounts are to be excluded from the denial, if by the terms of the gift enjoyment is deferred to a future time. Again, the crucial thing is postponement of enjoyment, not the fact that the beneficiary is specified and in esse or that the amount of the gift is definite and certain.[13]

The considerations, which petitioners advance to support their position, from the minority of the beneficiaries and their consequent legal disability to manage and control their property are intermingled with others relating to the motives of the donors in

[11] Cf. text at note 12 *infra*.

[12] Cf. note 10 *supra*.

[13] The absence of these factors is relevant as showing the more clearly that postponement exists and therefore the exemption does not apply. Their presence does not show that there is no postponement or that the exemption applies. The administrative difficulties relating to these matters "in many instances" were reasons for denying the exemption. They do not and were not intended to encompass the full scope of the denial. As the statute extended the exemption, "in the specified amount," to all gifts, whether large

making the gifts. It is said that their purpose was to provide for the "comfort, support, maintenance and welfare," including education, of the grandchildren; that the latter were incapable of taking over the management and control of the property; that accordingly it was necessary for some arrangement to be made for vesting this power in trustees or others capable of exercising it; that the trustees were given no power to withhold either income or corpus in case of need; and consequently the whole fund became available to the beneficiary for his maintenance "immediately upon the consummation of the gift," so that he was vested at once with the right of present enjoyment as fully as any child of tender years could be and in no way differently, taking account of his disability, than any owner of property by title in fee simple.

So far as the argument turns on the motive of the donors, it may be answered that the statute and the regulation make no such test. If motive has bearing, it is only by reason of its effect upon the element of time and whatever relation may be given, by the particular terms of the gift, to it and the disclosing of a purpose to provide for or against immediate enjoyment. The statute in this respect purports to make no distinction between gifts to minors and gifts to adults. If there is deferment in either case the exemption is denied. Consequently in this case the donors' laudable desire to make provision for their grandchildren in case of future need cannot nullify the deferment which the recited absence of present need, coupled with the terms of the trust, brought about. Again, contingency of need in the future is not identical with the fact of need presently existing. And a gift effective only for the former situation is not effective, for purposes of relief from the tax, as if the latter were specified, whether the donee is an adult or a minor.

Upon the facts, furthermore, the trusts hardly can be taken as designed primarily for the periods covered by the children's minority. They did not terminate with the ending of that period. The graduated scale of payments, beginning at age twenty-five and ending at thirty-five, together with the prohibition of payment earlier except in case of necessity, shows principal concern for a period of adult life. And, from the fact that this would be the period when the grandchildren normally would be assuming family

or small, 'made to any person,' " Helvering *v.* Hutchings, 312 U. S. 393, 397, so it denied the exemption to all gifts, whether large or small, vested or contingent, made to any person, whether specified and in esse or ascertainable only in the future, and whether for a specific or a presently unascertainable amount, if the gift is one of a "future interest in property," that is, one as to which enjoyment is postponed to some future time.

responsibilities of their own, the inference well might be drawn that the chief purpose was to give aid and some security in that time. The contingent provision, in case of earlier need, cannot be taken therefore to represent the donors' primary concern as expressed in the instruments. Cf. *Fisher* v. *Commissioner*, 132 F. 2d 383, 386. But, whether so or not, in the particular circumstances that need was but a contingency to be realized, if at all, in the future. And, until realized, the contingency stood squarely in the way of any child's receiving a single dollar from the fund.

Finally it is urged that unless these gifts are to be taken as conferring the right to immediate enjoyment, no gift for the benefit of a child of tender years can be so regarded since in any such case "some competent person must be the primary judge as to the necessity and extent of reasonable requirements of the beneficiary." The argument is appealing, in so far as it seeks to avoid imputing to Congress the intention to "penalize gifts to minors merely because the legal disability of their years precludes them for a time from receiving their income in hand currently." Cf. *Disston* v. *Commissioner*, 144 F. 2d 115, 119. But we think it is not applicable in the facts of this case, since by the terms of the trusts and the facts recited in the instruments none of the fund, whether income or corpus, could be applied immediately for the child's use or enjoyment.

It does not follow, as petitioners say, that if the exemption does not apply in this case it can apply in no other made for a minor's benefit. Whenever provision is made for immediate application of the fund for such a purpose, whether of income or of corpus, the exemption applies. Whether, in the case of a gift requiring such an application of the income, but providing for retention of a corpus no more than reasonably sufficient to produce the income required for this purpose and to insure its continued payment during minority, the donation would fall within the exemption, as to corpus as well as income, is a question not presented on this record and therefore not determined.

The regulation has received the construction now reaffirmed with substantial consistency. The statute, with the meaning thus settled, has been reenacted by Congress.[14] The construction should be followed until Congress sees fit to change it.

The judgment is

Affirmed.

[14] Congress withdrew the exclusion, as to gifts in trust, in the Revenue Act of 1938, c. 289, 52 Stat. 447, § 505, amending § 504(b) of the 1932 Act. But it was restored, though reduced to $3,000, by the Revenue Act of 1942, c. 619, 56 Stat. 798, §454.